No. 94-9247-CFY
Status: GRANTED

Title: Charles Carlisle, Petitioner
v.
United States

Docketed:
May 12, 1995

Court: United States Court of Appeals for the Sixth Circuit

Counsel for petitioner: Christopherson,James A.

Counsel for respondent: Solicitor General

Entry	Date	Note	Proceedings and Orders
1	May 12 1995	G	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed.
3	Jun 2 1995		Brief of respondent United States in opposition filed.
4	Jun 8 1995		DISTRIBUTED. June 23, 1995 (Page 10)
5	Jun 13 1995	P	Response requested -- JPS. (Due July 13, 1995)
7	Jul 6 1995		Order extending time to file response to petition until August 14, 1995.
8	Aug 7 1995		Brief of respondent United States in opposition filed.
9	Aug 10 1995		REDISTRIBUTED. September 26, 1995 (Page 88)
11	Sep 27 1995		Petition GRANTED. The brief of petitioner is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Thursday, November 9, 1995. The brief of respondent is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Friday, December 8, 1995. A reply brief, if any, is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m.,Thursday, December 28, 1995. Rule 29.2 does not apply.
			**********
13	Oct 30 1995		Record filed.
		*	Partial record proceedings United States Court of Appeals for the Sixth Circuit.
12	Nov 1 1995		SET FOR ARGUMENT TUESDAY, JANUARY 16, 1996. (2ND CASE).
14	Nov 7 1995		Brief of petitioner Charles Carlisle filed.
16	Nov 7 1995		Joint appendix filed.
18	Nov 20 1995		Record filed.
		*	Original record proceedings filed in the United States District Court for the Western District of Michigan (BOX)
17	Nov 27 1995		CIRCULATED.
19	Dec 7 1995	X	Brief of respondent United States filed.
20	Dec 28 1995	X	Reply brief of petitioner Charles Carlisle filed.
21	Jan 16 1996		ARGUED.

ORIGINAL

No. 94-9247

In The

Supreme Court of the United States

October Term, 1994

Supreme Court, U.S.
FILED
MAY 12 1995
OFFICE OF THE CLERK

Charles Carlisle,
Petitioner

v.

United States of America

Petition For Writ of Certiorari
To The United States Court of Appeals
for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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22pp

QUESTION PRESENTED

Should a Motion for a Judgment of Acquittal brought under Federal Rule of Criminal Procedure 29(C), which is granted by the United States District Court, be overturned because it was filed eight (8) days after the jury's verdict?

LISTING OF ALL PARTIES

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APPENDIX B — OPINION OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MICHIGAN, THE HONORABLE RICHARD A. ENSLEN PRESIDING, IN THE CASE OF THE UNITED STATES OF AMERICA V. CHARLES CARLISLE, FILE NO. 1:93:CR:66-02, GRANTING DEFENDANT CHARLES CARLISLE'S MOTION FOR JUDGMENT OF ACQUITTAL, ENTERED ON OCTOBER 27, 1993.

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No. _____

IN THE SUPREME COURT

OF THE

UNITED STATES OF AMERICA

October Term, 1994

Charles Carlisle, Petitioner

vs.

United States of America, Respondent

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Petitioner, Charles Carlisle, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit reversing the District Court's Opinion granting the Petitioner an Acquittal under Federal Rule of Criminal Procedure 29(C).

OPINIONS BELOW

The Opinion of The United States Court of Appeals for the Sixth Circuit, in the case of United State of America v Charles Carlisle, File No. 93-2470, reversing the District Court's opinion granting Defendant Charles Carlisle's Motion for a Judgment of Acquittal under Federal Rule of Criminal Procedure 29(C) appears in Appendix A to this Petition. The October 27, 1993 Opinion of the United States District Court for the Western District of Michigan, the Honorable Richard A. Enslen presiding, in the case of United States of America v Charles Carlisle, File No. 1:93:CR:66-02 granting Defendant Charles Carlisle's Motion for a Judgment of Acquittal pursuant to Federal Rule of Criminal Procedure 29(C) appears in Appendix B to this Petition.

JURISDICTION

On March 15, 1995 the United States Court of Appeals for the Sixth Circuit issued a Judgment ordering that the District Court's Judgment of Acquittal of Defendant Charles Carlisle be reversed. The case was remanded to the District Court to reinstate the jury's verdict and for sentencing. The United States Supreme Court has jurisdiction to review the Judgment entered by the United States Court of Appeals for the Sixth Circuit under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Federal Rule of Criminal Procedure 29(C) provides:

> **Motion after discharge of jury.** If the jury returns a verdict of guilty or is discharged without having returned a verdict, a motion for judgment of acquittal may be made or renewed within 7 days after the jury is discharged or within such further time as the court may fix during the 7-day period. If a verdict of guilty is returned the court may on such motion set aside the verdict and enter judgment of acquittal. If no verdict is returned the court may enter judgment of acquittal. It shall not be necessary to the making of such a motion that a similar motion has been made prior to the submission of the case to the jury.

STATEMENT OF THE CASE

The United States District Court of the Western District of Michigan had jurisdiction over this criminal case pursuant to 28 U.S.C. § 1331.

On April 12, 1993 Defendant Charles Carlisle was named in one count of a seven defendant criminal complaint charging conspiracy to possess marijuana with intent to distribute, in violation of 21 U.S.C. §§ 841 and 846. On July 13, 1993, a jury convicted Defendant Charles Carlisle of conspiracy to possess marijuana with intent to distribute, in violation of 21 U.S.C. §841 and §846. On July 23, 1993, Defendant Charles Carlisle, through his trial counsel, filed a Motion for a Judgment of Acquittal. On August 24, 1993, the United States District Court for the Western District of Michigan denied the Motion for a Judgment of Acquittal, finding that a rational trier of fact could find the Defendant guilty.

The District Court did not originally deny the Motion for a Judgment of Acquittal on the basis that the Motion was not timely filed. The District Court, in its written opinion, did not discuss the fact that the Motion was filed eight business days after the jury's verdict.

Sentencing was scheduled for October 14, 1993. On October 14, 1993, the District Court reversed its earlier opinion, and granted Defendant Charles Carlisle's Motion for a Judgment of Acquittal. The District Court subsequently signed an eight page written opinion. The District Court specifically found as follows:

> The facts of this case require the same result as those in Burgess and Pearce. The government produced no evidence that Charles Carlisle entered into an agreement with any member of the conspiracy. Like the Burgess defendant, he was clearly present during the conspiracy, and the jury certainly could have found that he knew about it. However, in the course of hours of tape recorded conversations, no conspirators suggest that Carlisle is involved in this conspiracy. There was no evidence that he was involved in arranging the transport of the marijuana to Michigan. In fact, Crawford testified that prior to coming to Michigan he had never heard of Carlisle. Carlisle never handled the drugs or the truck which contained them, and there was no evidence that Carlisle was to benefit from the conspiracy. I find that Carlisle's hearsay statement concerning scanners, and the fact that he drove a conspirator (his common law mother-in-law) to her home, and then drove two conspirators to a hotel and dropped them off, is insufficient to establish that he knowingly and voluntarily joined the conspiracy.
>
> Viewing the evidence in the light most favorable to the government, I find that the government's case against Charles Carlisle is insufficient to prove beyond a reasonable doubt that Carlisle knowingly and voluntarily joined the conspiracy. As a result, the defendant's motion will be granted. (Pages 4-5 of the District Court's October 28, 1993 Opinion.)

The United States of America filed an Appeal with the United States Court of Appeal for the Sixth Circuit. On February 21, 1995 the United States Court of Appeals for the Sixth Circuit issued a published Opinion, and reversed the Judgment of Acquittal because "under Rule 29, it is beyond the court's jurisdiction to grant an untimely motion for acquittal."

REASON FOR GRANTING THE WRIT

The United States Court of Appeals for the Sixth Circuit, in the case of United States of America v Charles Carlisle, has reached a decision that is in conflict with published decisions of other United States Courts of Appeals on this same matter. The following circuits have, in conflict with the opinion issued by the Sixth Circuit in United States of America v Charles Carlisle, ruled that a Defendant's Motion for a Judgement of Acquittal under Federal Rule of

Criminal Procedure 29(C) which is filed only one day late should be decided by the District Court.

A. United States v Coleman, 811 F.2d 804 (3rd Cir. 1986)

B United States v DiBernado, 880 F.2d 1216 (11th Cir. 1989)

C. Arizona v Manypenny, 672 F.2d 761 (9th Cir.) cert. denied, 459 U.S. 850, 103 S.Ct. 111, 74 L.Ed.2d 98 (1982)

D. United States v Mendonza, 565 F.2d 1285 (5th Cir. 1978)

E. United States v Giampa, 758 F.2d 928 (3rd Cir. 1985)

In this case the United States of America has argued that the Motion for a Judgment of Acquittal should have been filed by July 22, 1993. It was filed on July 23, 1993. Therefore, it is the United States of America's argument that the Motion was filed one day too late, and as a result, the Defendant has completely lost his right to file a Motion for a Judgment of Acquittal. The district court ruled as follows:

> Rule 29(c) allows defendant seven days after the jury is discharged, "or within such further time as the court may fix during the 7-day period," to bring a motion for judgment of acquittal. The government correctly points out that this deadline occurred on July 22 in this case, but the defendant's motion was filed on July 23. However, I can conceive of no prejudice to the United States which will result from consideration of a motion that is one day late in this case. Because I believe that refusal to hear this motion would result in grave injustice, and because the Rule permits the Court to extend the deadline, I will consider this motion as if it were filed in a timely manner. (Page 1 of the District Court's October 28, 1993 Opinion.)

There are two questions which the United States Supreme Court should address in deciding whether or not to strictly enforce Federal Rule of Criminal Procedure 29(a). First, what prejudice is there to the United States of America? On that issue, it certainly cannot be argued that there was any prejudice. The motion was only filed one day late.

The second question the United States Supreme Court should address is what is the purpose behind Federal Rule of Criminal Procedure 29(c)? The purpose behind the rule, as

identified in Unites States v Smith, 331 U.S. 469, 67 S.Ct. 1330, 91 L.Ed.2d 1610 (1947), is to avoid a trial judge deciding a motion after a considerable period of time has passed. After a considerable period of time has passed, the trial judge may not remember the particular facts of the trial. Therefore, when there is a considerable period of time (not eight days) there is a legitimate reason to not allow the district court to decide the case and grant a new trial.

The purpose behind Federal Rule of Criminal Procedure 29(c) would not be served by applying the rule to the facts of this case. The Motion for a Judgment of Acquittal was filed only one day late. The purpose for the rule would not be served by refusing to allow a District Court to decide a Motion for a Judgment of Acquittal that is filed one day late. The District Court has available to it less drastic sanctions to enforce Federal Rule to Criminal Procedure 29, as opposed to completely denying the Defendant his right to have his Motion for a Judgment of Acquittal decided. If the delay was due to defense counsel, the District Court has the authority to appropriately sanction defense counsel. But, the severe penalty and sanction of refusing the Defendant his right to have the Motion for a Judgment of Acquittal decided, should not be invoked where the motion is filed one day late.

Other circuits have recognized that a defendant should not be completely prejudiced where a Motion for a Judgment of Acquittal is filed only one day late. For example, in United States v Coleman, 811 F.2d 804, 807 (3rd Cir. 1986) the Third Circuit Court of Appeals held:

> However, the same result does not necessarily obtain for a motion of acquittal under Rule 29. In *United States v Giampa*, 758 F.2d 928, 936 n. 1 (3d Cir. 1985), this court specifically held that a district court may enter a judgment of acquittal "*sua sponte* under its inherent power," without regard to the seven-day requirement of Rule 29. *See also United States v. Wright-Barker*, 784 F.2d 161 (3d Cir. 1986) (reiterating *Giampa's* holding as to court's inherent power, but refusing to define limits of this power). This inherent power to enter a judgment of acquittal does not extend to judgments granting a new trial because such judgment, entered *sua sponte* by the court, might place the defendant twice in jeopardy. Even though the government may appeal an acquittal in some instances, the defendant will never face a new trial after such an appeal.

Here, although the district court entered a judgment of acquittal on Del Bono's motion for acquittal, and not *sua sponte*, it would be inconsistent to hold that the court's inherent power to grant an acquittal out of time *sua sponte* does not extend to those occasions when a motion is made and granted. Accordingly, Del Bono's acquittal cannot be reversed for such a procedural deficiency, and we must now consider the merits of the appeal.

In United States v DiBernardo, 880 F.2d 1216, 1225 (11th Cir. 1989) the Eleventh Circuit Court of Appeals held:

> The rules of criminal procedure, of course, do not demarcate the outer limits of a trial court's authority to vacate a judgment of conviction. Under its inherent supervisory power, a district court may consider an untimely post-trial motion for judgment of acquittal or may grant such a motion sua sponte to correct manifest error when it retains jurisdiction over the case. *See United States v. Coleman*, 811 F.2d 804, 806-07 (3d Cir.1987); *Arizona v Manypenny*, 672 F.2d 761, 764-65 (9th Cir.) *cert. denied*, 459 U.S. 850, 103 S.Ct. 111, 74 L.Ed.2d 98 (1982); *United States v Doherty*, 675 F. Supp. 726, 729 (D.Mass. 1987); *United States v. Broadus*, 664 F.Supp. 592, 595-98 (D.D.C. 1987). The rules must be applied flexibly "to provide for the just determination" of every case and must be construed "to secure simplicity in procedure, fairness in administration and the elimination of unjustifiable expense and delay." Rule 2, Fed. R.Crim.P.; *see Fallen v United States*, 378 U.S. 139, 142, 84 S.Ct. 1689, 1691, 12 L.Ed.2d 760 (1964); *United States v Mendonza*, 565 F.2d 1285, 1288-90 (5th Cir.1978). Thus if a district court has jurisdiction over a case, then the interests of justice demand that it review the sufficiency of the evidence for conviction, without regard to the technicalities of pleadings. *See Ansley v. United States*, 135 F.2d 207, 208 (5th Cir. 1943).

The rules should be applied flexibly. The Motion for a Judgment of Acquittal was filed only one day late. The district court correctly ruled it had the right to consider the Motion.

CONCLUSION

For the reasons set forth above, a Writ of Certiorari should issue to review the Judgment and Opinion of the Sixth Circuit Court of Appeals in this matter.

BLAKESLEE, CHAMBERS, PETERSON, DALRYMPLE & CHRISTOPHERSON, P.C.

Dated: May 9, 1995

By: _____
James A. Christopherson (P31585)
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ORIGINAL

No. 94-9247

Supreme Court, U.S.
FILED
MAY 12 1995
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1994

Charles Carlisle,
Petitioner

v.

United States of America

PROOF OF MAILING

James A. Christopherson
Counsel for Petitioner Charles Carlisle
Blakeslee, Chambers, Peterson,
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James A. Christopherson, being first duly sworn, deposes and says that on the 8th day of May, 1995, he did in fact mail three (3) copies of the **Petition for Writ of Certiorari** in the above-entitled matter, by then and there placing said document in an envelope clearly addressed to James R. Redford, Esq., attorney for United States of America, 399 Federal Building, 110 Michigan Avenue, N.W., Grand Rapids, MI 49503, telephone number (616) 456-2404 and three (3) copies of the **Petition for Writ of Certiorari** in the above-entitled matter, by then and there placing said document in an envelope clearly addressed to Solicitor, General Department of Justice, Washington D.C. 20540, and placing same in the U.S. Mail at Traverse City, Michigan, with postage fully prepaid for First Class Mail. All parties required to be served have been served.

James A. Christopherson

Subscribed and sworn to before

me this 9th day of May, 1995.

Karen A. Mayo, Notary Public
Grand Traverse County, Michigan
My commission expires: 12/19/98

Appendix A

Filed
93 Oct 28 AM 9:15
Clerk, U.S. District Court
Western District of Michigan

United States District Court

For the Western District of Michigan

UNITED STATES OF AMERICA,
Plaintiff,

v

File No. 1:93:CR:66-02
HON. RICHARD A. ENSLEN

CHARLES CARLISLE,
Defendant.

OPINION

In accordance with the oral opinion delivered from the bench on October 14, 1993, and for the reasons given therein, this Court's Opinion and Order of August 19, 1993, is withdrawn. In its place, the Court enters the following Opinion and Judgment:

The matter before the Court is defendant Carlisle's motion for a judgment of acquittal pursuant to Fed. R. Crim. P. 29(c). Defendant was charged in a single count Indictment with conspiracy to possess marijuana with intent to distribute. On July 13, 1993, a jury found defendant guilty.[1] Defendant's motion does not claim that there was not an agreement to possess

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[1] Rule 29(c) allows defendants seven days after the jury is discharged, "or within such further time as the court may fix during the 7-day period," to bring a motion for judgment of acquittal. The government correctly points out that this deadline occurred on July 22 in this case, but defendant's motion was filed on July 23. However, I can conceive of no prejudice to the United States which will result from consideration of a motion that is one day late in this case. Because I believe that refusal to hear this motion would result in grave injustice, and because the Rule permits the Court to extend the deadline, I will consider this motion as if it were filed in a timely manner.

and distribute marijuana. Instead, his motion argues that the evidence was insufficient to prove that he joined the conspiracy.

The standard of review for claims of insufficient evidence is "whether after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 319 (1979) (emphasis in original); United States v. Boling, 869 F.2d 965 (6th Cir. 1989). Reviewing the evidence in the light most favorable to the government means that I must make all credibility choices and inferences in a manner that supports the jury's verdict. Further, circumstantial evidence alone is sufficient to sustain a conviction and such evidence need not remove every reasonable hypothesis except that of guilt. United States v. Stone, 748 F.2d 361, 363 (6th Cir. 1984).

The evidence presented against Carlisle at trial was as follows. On the evening of April 10, 1993, defendant Rupert, Carlisle's common-law wife, defendant Ramon, Ms. Rupert's mother, and Thomas Crawford arrived at the residence on Yale Street that Carlisle and Rupert shared. Ramon travelled in a car driven by Rupert, and they were followed by a truck full of marijuana. That truck was driven by Crawford, the government's primary witness, who was wearing a tape-recording device at the time.

In his opening statement, defendant's counsel stated that Rupert told Carlisle that the truck contained marijuana, and that she was scared. The inference that Carlisle knew that the truck contained marijuana could also be drawn from a hearsay statement by Rupert I admitted. As soon as Ramon, Rupert and Crawford arrived at the Yale Street residence, Crawford recorded the following statement of Rupert: "Okay, just pull out and Chuck [Carlisle] says to go down the street and just park for awhile because he said he's heard over the scanner, there's some cops around here."[2], Cassette #1A, p. 5. Crawford parked the truck down the street.

When Crawford returned from parking the truck, he was introduced to Carlisle. Crawford testified that Carlisle was quiet and did not appear nervous. At this point, the parties appear to be discussing where to park the truck for the evening, and the following conversation ensued:

Ramon: We can park it behind the house.

Crawford: All right might good.

---

[2] This hearsay statement was the only evidence that there was a scanner in the Carlisle/Rupert home. A neighbor testified that she had been in the home on a daily basis during the time period in question, and never saw a scanner. Further, Agent Munson testified that he had been in the house and the back bedrooms, and never saw a scanner.

Amelia Ramon made reference to her grandson picking up signals on scanners. That person does not reside in the Carlisle/Rupert residence.

Carlisle: Figure right down the drive.

Ramon: Yeah, because my son called, my grandson called and said there was cops around here.

Rupert: around this area

Ramon: unintelligible

Rupert: and we don't want to take a chance right now

Carlisle: We don't want to take no chances.

Crawford: No, uh uh, that's why I was going, I, the speed limit was thirty and so I stayed right on it.

Ramon: Yeah? Oh and before I forget, on the key, the combination. I took the thing off and I put it on there so ...

Carlisle: Okay...is that for the back?

*** (one page later) ***

Ramon: We're going (unintelligible)

Crawford: Oh yeah it's best not take any...

Carlisle: No I won't take no chances...

Crawford: Okay.

Id. at 5-7.

At Rupert's request, Carlisle then drove Amelia Ramon to her home shortly after Rupert, Ramon and Crawford arrived at the Yale Street residence. The truck full of marijuana, driven by Crawford, followed. The truck was left at Ramon's home, and Crawford joined Carlisle and Ramon in the car. Carlisle then drove Crawford and Ramon to the Stouffer Hotel. During this trip, tape recordings indicated that there was nothing but casual banter about topics such as cars and the city of Battle Creek. Carlisle dropped them off and left. There was no evidence that Carlisle had any further contact with any member of the conspiracy.

Upon review of the evidence in this case under the foregoing standards, I find that it is not sufficient to sustain defendant's conviction. Viewed in the light most favorable to the

government, I believe that a rational trier of fact could find beyond a reasonable doubt that Carlisle knew about the conspiracy. However, I do not believe that a rational trier of fact could find beyond a reasonable doubt, as the jury was instructed in Instruction 10B it must, that Carlisle knowingly and voluntarily joined the conspiracy. Instruction 10C explained that in order to establish knowing and voluntary joinder,

> the government must prove that [the defendant] knew the conspiracy's main purpose, and that he voluntarily joined it intending to help advance or achieve his goals. . . . But proof that a defendant simply knew about a conspiracy, or was present at the time, or associated with members of the group, is not enough, even if he approved of what was happening or did not object to it. Similarly, just because a defendant may have done something that happened to help a conspiracy does not necessarily make him a conspirator. These are all things that you may consider in deciding whether the government has proved that a defendant joined a conspiracy. **But without more they are not enough.**

Sixth Circuit Pattern Criminal Instruction No. 3.03 (1991) (emphasis added). The Committee Notes cite many cases in support of this instruction. E.g., United States v. Richardson, 596 F.2d 157, 162 (6th Cir. 1979) (there must be proof of an intention an agreement to cooperate in the crime); United States v. Bostic, 480 F.2d 965, 968 (6th Cir. 1973) (there must be intentional participation in the transaction with a view to the furtherance of the common design and purpose).

In the unpublished decision of United States v. Burgess, 1992 U.S. App. LEXIS 34740 (6th Cir.), the court acknowledged that "[c]onspiracy cases often present difficult questions about the extent to which seemingly passive participants are nonetheless culpable members of the conspiracy." Id. at *21. The appellate panel went on to hold that there was insufficient evidence to support defendant Burgess' conviction for conspiracy to possess marijuana with intent to distribute. In Burgess, a defendant named Muncy planned to buy marijuana from DEA agent and informant. Muncy drove to the scheduled rendezvous point with Burgess and a third defendant, Rose. When they arrived, Muncy walked to the agents' car and discussed the purchase. Muncy then went back to his own car and brought Rose to the agents' car with him. After the transaction began, all three were arrested. A search of the car revealed a loaded revolver and $15,000 in cash in the front seat, and scales in the trunk.

Upon review of these facts, the Sixth Circuit concluded that the jury could have inferred Burgess' knowledge of the purpose of the trip, White's possession of money to purchase marijuana, and even the presence of a weapon in the car. However, because Burgess did not participate in the discussions with the agents, he was not mentioned in those conversations, he did not drive the car, and he never left the middle of the front seat, the court held that a rational trier of fact could not find that Burgess knowingly and voluntarily joined the conspiracy.

United States v. Pearce, 912 F.2d 159 (6th Cir. 1990), cert. denied sub nom Thorpe v. United States, 111 S.Ct. 978 (1991), provides another example of evidence which the Sixth Circuit found to be sufficient to sustain a conspiracy conviction. Defendants Thorpe and Pearce were convicted of conspiring to possess and distribute crack in violation of 21 U.S.C. § 846 on the following evidence. A SWAT team entered what they suspected was a crack house after an informant purchased crack at the house with registered bills. When they entered, Thorpe ran into the basement yelling "it's a bust." The SWAT team found Thorpe nearby two doses of crack and a loaded revolver. Thorpe had a live round in his pocket that matched those found in the gun. The police found Pearce sitting on a couch in the living room. Next to him was a bag of crack and the registered bills the informant used in his purchase.

The Sixth Circuit reversed both conspiracy convictions. It found that the record was devoid of any evidence that Thorpe and Pearce had entered into an agreement. Although the defendants' presence at the house was unexplained, the court concluded that the no rational trier of fact could have found that even tacit coordination between Thorpe, Pearce, or any third party, to maintain a crack house or to distribute crack.

The facts of this case require the same result as those in Burgess and Pearce. The government produced no evidence that Charles Carlisle entered into an agreement with any member of the conspiracy. Like the Burgess defendant, he was clearly present during the conspiracy, and the jury could have found that he knew about it. However, in the course of hours of tape recorded conversations, no conspirators suggest that Carlisle is involved in the conspiracy. There was no evidence that he was involved in arranging the transport of the marijuana to Michigan. In fact, Crawford testified that prior to coming to Michigan, he had not heard of Carlisle. Carlisle never handled the drugs or the truck which contained them, and there was no evidence that Carlisle was to benefit from the conspiracy. I find that Carlisle's hearsay statement concerning the scanners, and the fact that he drove a conspirator (his common law mother-in-law) to her home, and then drove two conspirators to a hotel and dropped them off, is insufficient to establish that he knowingly and voluntarily joined the conspiracy.

Viewing the evidence in the light most favorable to the government, I find that the government's case against Charles Carlisle is insufficient to prove beyond a reasonable doubt that Carlisle knowingly and voluntarily joined the conspiracy. As a result, defendant's motion will be granted.

Dated in Kalamazoo, MI:
October 27, 1993

"s/Richard A. Enslen"
RICHARD A. ENSLEN
United States District Judge

RECOMMENDED FOR PARTIAL-TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 24

ELECTRONIC CITATION: 1995 FED App. 0063P (6th Cir.)
File Name: 95a0063p.06

Nos. 93-2373/2380/2470; 94-1105

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

DELORES RUPERT (93-2373);
MICHAEL HALL (93-2380); and
AMELIA RAMON (94-1105),
Defendants-Appellants.

ON APPEAL from the United States District Court for the Western District of Michigan

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

v.

CHARLES CARLISLE (93-2470),
Defendant-Appellee.

Decided and Filed February 21, 1995

Before: BROWN, RYAN, and BOGGS, Circuit Judges.

BOGGS, Circuit Judge. Rupert, Ramon, and Hall appeal their convictions for conspiracy to possess marijuana with the intent to distribute, in violation of 21 U.S.C. §§ 841 and 846. The government appeals the court's granting of Carlisle's motion for acquittal. We affirm the convictions of Rupert, Ramon, and Hall, and reverse Carlisle's acquittal. Our discussion of the issues presented by Rupert, Ramon, and Hall is contained in an unpublished appendix to this decision.

I

The government argues on appeal that the district court lacked jurisdiction to acquit Carlisle.

On July 13, the jury convicted Carlisle, along with the other defendants before us, of one count of conspiracy to possess marijuana with intent to distribute. On July 23, Carlisle filed a motion for judgment of acquittal. The seven-day period in which Carlisle could move for acquittal under Fed. R. Crim. P. 29 does not include weekends, so it lapsed on July 22. The district court denied Carlisle's motion on August 24, 1994.

When Carlisle appeared for sentencing on October 14, however, the court on its own motion reversed its earlier decision and granted Carlisle's motion for acquittal.[1] The

[1]The court noted in footnote 1 of its Opinion:

> The government correctly points out that . . . defendant's motion was filed on July 23. However, I can conceive of no prejudice to the United States which will result from consideration of a motion that is one day late in this case. Because I believe that refusal to hear this motion would result in grave injustice, and because the Rule [29] permits the court to extend the deadline, I will consider this motion as if it were filed in a timely manner.

court wrote: "I do not believe that a rational trier of fact could find beyond a reasonable doubt, as the jury was instructed in Instruction 10B it must, that Carlisle knowingly and voluntarily joined the conspiracy." The district court held that the evidence was insufficient to convict under *Jackson v. Virginia*. Following the Sixth Circuit's decision in *United States v. Burgess*, 931 F.2d 893 (6th Cir. 1991) (Table), 1991 WL 66056, and *United States v. Pearce*, 912 F.2d 159 (6th Cir. 1990), *cert. denied*, 111 S. Ct. 978 (1991), the district court found that the government failed to prove that Carlisle entered into an agreement.

Under Rule 29, it is beyond the court's jurisdiction to grant an untimely motion for acquittal. Furthermore, it is beyond a court's jurisdiction to enter a judgment of acquittal *sua sponte* after the case has been submitted to the jury. Fed. R. Crim. P. 29; *United States v. Davis*, 992 F.2d 635, 640 (6th Cir.), *cert. denied*, 114 S. Ct. 265 (1993); *see also United States v. Dennard*, 7 F.3d 235 (6th Cir. 1993)(Table), 1993 WL 351742.

In *Davis*, as here, the district court initially denied defendant's motion for acquittal. At sentencing, however, the court, as here, reversed its previous decision, asserting that it had the inherent authority to consider a judgment of acquittal after the discharge of the jury "if necessary to correct manifest injustice." *Id.* at 637. On appeal, we ruled that a district court does not have such inherent authority. *Id.* at 638. We noted that there is no provision in Rule 29 that allows a court to act on its own initiative after the case is submitted to the jury. *Id.* at 639. However, under Rule 29(c), if Carlisle had moved for acquittal within seven days of the discharge of the jury (or later, if the court so allowed during that seven-day period), it would have been within the court's jurisdiction to grant Carlisle's motion for acquittal.

The district court lacked the jurisdiction to acquit Carlisle. We therefore must reverse the judgment of acquittal.

II

In conclusion, we affirm the convictions of Ramon, Rupert, and Hall. However, we reverse Carlisle's judgment of acquittal and remand for the district court to reinstate the jury's verdict and for sentencing.

LB

(9)

Supreme Court, U.S.
FILED
JUN 2 1995
OFFICE OF THE CLERK

No. 94-9247

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

CHARLES CARLISLE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

DREW S. DAYS, III
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Department of Justice
Washington, D.C. 20530
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MEMORANDUM FOR THE UNITED STATES
IN OPPOSITION

Petitioner contends that the court of appeals erred in reversing the order of the district court granting a post-verdict judgment of acquittal.

Petitioner was indicted by a grand jury sitting in the United States District Court for the Western District of Michigan. He was charged with conspiracy to possess marijuana with intent to distribute it, in violation of 21 U.S.C 846. Following a jury trial, petitioner was found guilty as charged.

Petitioner filed a motion for judgment of acquittal on July 23, 1993, one day beyond the seven-day period allowed for such motions under Fed. R. Crim. P. 29(c). The district court denied the motion on August 24, 1993. When petitioner appeared for sentencing on October 14, 1993, the court on its own motion

reversed its earlier decision and granted a judgment of acquittal.

In a written opinion issued on October 28, 1993, the district court considered the motion for judgment of acquittal as if it were timely filed because Rule 29(c) permits an extension of the deadline for filing such motions. The court concluded that refusal to hear the motion would result in grave injustice, because the evidence was insufficient to establish that petitioner joined the conspiracy charged. Pet. App. A1-A5.

The court of appeals reversed. Pet. App. B1-B4. Relying on its decision in United States v. Davis, 992 F.2d 635 (6th Cir.), cert. denied, 114 S. Ct. 265 (1993), the court held that the district court lacked jurisdiction to grant an untimely motion for acquittal under Fed. R. Crim. P. 29. Pet. App. B3-B4.

Petitioner contends (Pet. 3-6) that a district court has jurisdiction under Fed. R. Crim. P. 29(c) to grant an untimely motion for a judgment of acquittal. Whatever the merits of petitioner's contention, it is not presently ripe for review by this Court. The court of appeals' decision is not a final judgment against petitioner. After imposition of sentence by the district court, petitioner can again take an appeal to the court of appeals raising any sentencing issues that may be available to him and preserving the claim he has raised here. If the court of appeals affirms the final judgment against him, petitioner will then be able to present his current contention to this Court, together with any other claims he may have, in a petition for a

writ of certiorari. Accordingly, review by this Court of the court of appeals' decision would be premature at this time.*

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

DREW S. DAYS, III
Solicitor General

JUNE 1995

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* Because this case is interlocutory, we are not responding on the merits to the question presented by the petition. We will file a response on the merits if the Court requests.

ORIGINAL

No. 94-9247

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BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the district court lacked authority to grant a post-verdict motion for judgment of acquittal filed outside the time limits prescribed by Federal Rule of Criminal Procedure 29(c).

IN THE SUPREME COURT OF THE UNITED STATES

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. B1-B4) is reported at 48 F.3d 190.

JURISDICTION

The judgment of the court of appeals was entered on February 21, 1995. The petition for a writ of certiorari was filed on May 12, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

A grand jury sitting in the United States District Court for the Western District of Michigan indicted petitioner for conspiring to possess marijuana with intent to distribute it, in

violation of 21 U.S.C. 846. Following a jury trial, petitioner was found guilty. He filed an untimely post-verdict motion for judgment of acquittal under Federal Rule of Criminal Procedure 29(c), which the district court initially denied, and then sua sponte reconsidered and granted. Pet. App. A1-A5. The court of appeals reversed on the ground that the district court lacked authority to consider the untimely motion. Pet. App. B1-B4.

1. Petitioner's jury trial began on June 30, 1993. He did not move for a judgment of acquittal under Fed. R. Crim. P. 29(a) at any time during the trial. After the jury returned a verdict of guilty, it was discharged on July 13, 1993. Petitioner filed a post-verdict motion for judgment of acquittal on July 23, 1993, one day after the seven-day period allowed for such motions under Fed. R. Crim. P. 29(c).[1] He asserted that the evidence was insufficient to demonstrate that he participated in the conspiracy. In a written opinion dated August 24, 1993, the district court did not address the lateness of the motion, but denied it on the ground that the evidence was "sufficient for a rational trier of fact to find that [petitioner] knowingly and voluntarily joined the conspiracy." United States v. Carlisle, No. 1:93:CR:66-02 (W.D. Mich. Aug. 24, 1993), slip op. 7 (attached).

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[1] Rule 29(c) provides that "a motion for judgment of acquittal may be made or renewed within 7 days after the jury is discharged or within such further time as the court may fix during the 7-day period." Fed. R. Crim. P. 45(a) provides that "Saturdays, Sundays and legal holidays shall be excluded" from the seven-day period. Excluding the weekend of July 17-18, 1993, petitioner's motion was one day late.

When petitioner appeared for sentencing on October 14, 1993, the district court on its own motion reversed its earlier decision and granted a judgment of acquittal. Pet. App. A1-A5; id. at B2. Noting that the motion was filed after the filing deadline, the court nonetheless treated it as timely, stating:

> I can conceive of no prejudice to the United States which will result from consideration of a motion that is one day late in this case. Because I believe that refusal to hear this motion would result in grave injustice, and because the Rule permits the Court to extend the deadline, I will consider this motion as if it were filed in a timely manner.

Id. at B1 n.1. Reviewing the same evidence that it had considered in its initial opinion, the district court concluded that the evidence was "insufficient to prove beyond a reasonable doubt that [petitioner] knowingly and voluntarily joined the conspiracy." Id. at A5.

2. The court of appeals reversed. Pet. App. B1-B4. Relying on its earlier decision in United States v. Davis, 992 F.2d 635 (6th Cir.), cert. denied, 114 S. Ct. 265 (1993), the court held that the district court lacked jurisdiction to grant an untimely motion for acquittal under Fed. R. Crim. P. 29(c), or to enter a judgment of acquittal sua sponte after the case has been submitted to the jury. Pet. App. B3-B4. Although both parties briefed the question whether the evidence was sufficient, Gov't C.A. Br. at 9-11; Pet. C.A. Br. at 9-15, the court of appeals did not address whether the evidence was sufficient to support the conviction. See Pet. App. B3-B4.

ARGUMENT

Petitioner contends (Pet. 3-6) that a district court has authority to grant an untimely post-verdict motion for judgment of acquittal, and that the contrary decision below conflicts with the decisions of other courts of appeals. The decision of the court of appeals is correct, there is no circuit conflict, and the issue presented warrants no further review.

1. The decision of the court of appeals is in accord with the text of Rule 29(c), which provides that a motion for judgment of acquittal after verdict "may be made or renewed within 7 days after the jury is discharged or within such further time as the court may fix during the 7-day period." Rule 45(b) in turn provides that the district court "may not extend the time for taking any action under Rules 29, 33, 34 and 35, except to the extent and under the conditions stated in them." These two Rules, read together, show that the seven-day time limit in Rule 29(c) is mandatory, and that the court cannot retroactively extend it.

Rule 29 also prohibits the district court of appeals from achieving the same result by sua sponte granting an acquittal afte. the seven-day time limit has elapsed. In United States v. Smith, 331 U.S. 469 (1947), this Court held that a district court may not grant a new trial on its own motion under Fed. R. Crim. P. 33 beyond the Rule's time limit for making new trial motions. In language that parallels that of Rule 29(c), Rule 33 authorized a motion for a new trial "within 5 days after verdict or finding

of guilty or within such further time as the court may fix during the 5-day period."[2] Although Rule 33, like Rule 29(c), does not expressly address sua sponte action by the court, this Court in Smith concluded that the "expiration of the time within which relief can openly be asked of the judge, terminates the time within which it can properly be granted on the court's own initiative." 331 U.S. at 475. The Court explained that "[t]he trial judge is given power by the Rules to entertain motions for new trial within five days after verdict and may extend that time for so long as he thinks necessary for proper consideration of the course of the trial," but emphasized that "extension of that time indefinitely is no insurance of justice." Id. at 475-476. Rather, "[i]t is in the interest of justice that a decision on the propriety of a trial be reached as soon after it has ended as is possible, and that decision be not deferred until the trial's story has taken on the uncertainty and dimness of things long past." Id. at 476.[3] The same reasoning applies to the time limits established in Rule 29(c).

2. The decision of the court of appeals accords with the holdings of other circuits that a district court lacks authority

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[2] The 1966 amendments to Fed. R. Civ. P. 29(c) and 33 extended the time limits in both Rules from five days to seven.

[3] Contrary to petitioner's contention (Pet. 4-5), Smith does not contemplate a case-by-case evaluation of whether "a considerable period of time" has passed creating a risk of uncertainty regarding the strength of the evidence in the individual case. Rather, Smith made clear that "[t]he time limitations of Rule 33 are jurisdictional." 3 Charles Alan Wright, Federal Practice and Procedure (Criminal) § 558, at 360 (2d ed. 1982); id. at 361 n.1 (collecting cases).

to grant an untimely motion under Rule 29(c). See, e.g., United States v. Stevens, 978 F.2d 565, 569 (10th Cir. 1992); United States v. Hocking, 841 F.2d 735, 736-737 (7th Cir. 1988); United States v. Johnson, 487 F.2d 1318, 1321 (5th Cir.), cert. denied, 419 U.S. 825 (1974). See also United States v. Davis, 992 F.2d 635, 636-640 (6th Cir.), cert. denied, 114 S. Ct. 265 (1993).

Petitioner claims (Pet. 4) that several circuits have adopted a contrary rule. While some decisions contain language suggesting that a district court has inherent authority to enter a judgment of acquittal even when the defendant fails to file a motion within time limits imposed by Rule 29, no other decision has reached a result that squarely conflicts with the decision below. Rather, the allegedly conflicting decisions have all involved action by the court or the defendant within the time limits of Rule 29.

In Arizona v. Manypenny, 672 F.2d 761, 764-765 (9th Cir.) (Kennedy, J.), cert. denied, 459 U.S. 850 (1982), the defendant filed his Rule 29(c) motion within seven days of the jury's verdict. The district court initially denied the motion, but then sua sponte granted it in connection with its consideration of a motion for an arrest of judgment under Fed. R. Crim. P. 34. The court of appeals held only that the district court had authority to revisit its earlier denial of the timely filed Rule 29 motion in those circumstances; it expressly declined to "address the scope of inherent power in other contexts." 672 F.2d at 766. The Ninth Circuit has not applied the theory of

"inherent power" voiced in Manypenny outside of the circumstance in which defendant the timely filed a motion. See United States v. Godoy, 678 F.2d 84, 88 (9th Cir. 1982), cert. denied, 464 U.S. 959 (1983) (stating that sua sponte district court action under Rule 29(c) more than seven days after the verdict would have been untimely where "[n]othing had been done during [the time allowed by Rule 29(c)] by either the parties or the court to preserve the matter for such late action").

In United States v. Coleman, 811 F.2d 804, 807 (3d Cir. 1987), the defendant sought an extension of time for filing a motion for judgment of acquittal within the seven-day period. The court, however, granted the requested extension after that period had elapsed. The court of appeals concluded that the failure of the defendant to file his Rule 29 motion in a timely fashion did not prevent the district court from acting on it, because the court believed that "a district court may enter a judgment of acquittal 'sua sponte under its inherent power,' without regard to the seven-day requirement of Rule 29." 811 F.2d at 807, citing United States v. Giampa, 758 F.2d 928, 936 n.1 (3d Cir. 1985).[4] In Coleman, unlike here, the defendant had

[4] Giampa is inapposite here. In that case, the district court discharged the jury citing a violation of Brady v. Maryland, 373 U.S. 83 (1963), but eight days later entered a judgment of acquittal based on insufficient evidence. The court of appeals concluded that Rule 29 did not prohibit the court's action eight days after trial because of the court's "inherent power." 758 F.2d at 936 n.1. The court of appeals had previously determined, however, that the district court's statements during trial revealed that the basis for his termination of the case and dismissal of the jury was his belief that the government's evidence was insufficient. Id. at 934-935.

taken action to preserve his rights within the time limits prescribed by Rule 29, and his later motion was untimely because of error by the court. The Third Circuit has not had occasion to revisit the issue in a concrete context since Coleman.[5]

The other cases cited by petitioner discuss the time limits in Rule 29(c) only in dictum. United States v. DiBernardo, 880 F.2d 1216, 1225 n.4 (11th Cir. 1989), did not involve a Rule 29(c) motion, but referred to Coleman and Manypenny in ruling on the timeliness of a motion for a new trial under Fed. R. Crim. P. 33. United States v. Mendoza, 565 F.2d 1285 (5th Cir. 1978), also did not involve Rule 29(c), but addressed the timeliness of a Rule 35 motion for reduction of sentence; moreover, since Mendoza, the Fifth Circuit has also noted "the conceded lack of jurisdiction of a district court to consider an untimely motion for judgment of acquittal." United States v. Brown, 587 F.2d 187, 190 n.6 (5th Cir. 1979) (dictum).

3. In any event, the question presented here is of limited practical importance. Rule 29(a) authorizes motions for judgment of acquittal before a case is submitted to the jury but after the evidence on either side is closed. Although petitioner failed to

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[5] See United States v. Wright-Barker, 784 F.2d 161, 170 n.8 (3d Cir. 1986) (noting in dictum Giampa's apparent tolerance of a district court's sua sponte grant of a judgment of acquittal in the absence of a timely motion, but observing that the district court in the case before it had not sought to exercise any such authority); United States v. Knox, 977 F.2d 815, 819 (3d Cir. 1992) (noting that district court had discretion under Coleman but that it acted within its discretion in declining to reach merits of Rule 29 motion filed three months after verdict), vacated on other grounds, 114 S. Ct. 375 (1993).

do so here, defendants typically file such motions and thereby preserve their right to appellate review of evidentiary sufficiency even in the absence of a Rule 29(c) post-verdict motion. See, e.g., United States v. Sharif, 817 F.2d 1375, 1377 (9th Cir. 1987). The same standard governs an appeal from the denial of the Rule 29(a) motion as applies to a Rule 29 motion made at any stage in the district court -- i.e., whether the evidence, taken in the light most favorable to the government, is sufficient for a reasonable jury to find the defendant guilty beyond a reasonable doubt. See Jackson v. Virginia, 443 U.S. 307, 319 (1979); United States v. Overmyer, 867 F.2d 937, 938 (6th Cir.), cert. denied, 493 U.S. 813 (1989). Thus, in the typical case, failure to file a timely Rule 29(c) motion merely changes the forum in which a defendant presents his post-verdict sufficiency claim. And even a defendant who does not file any timely motion under Rule 29 may seek appellate review of his claim of evidentiary insufficiency under a plain error standard, see Fed. R. Crim. P. 52. See, e.g., United States v. Fagan, 821 F.2d 1002, 1009 n.2 (5th Cir. 1987). The holding of the court of appeals thus does not completely foreclose judicial review of the sufficiency of the evidence.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

JO ANN HARRIS
Assistant Attorney General

DAVID S. KRIS
Attorney

AUGUST 1995

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WESTERN DIST. OF MICH.
BY

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF MICHIGAN

UNITED STATES OF AMERICA,

Plaintiff,

v

CHARLES CARLISLE,

Defendant.

File No. 1:93:CR:66-02

HON. RICHARD A. ENSLEN

OPINION

The matter before the Court is defendant Carlisle's motion for a judgment of acquittal pursuant to Fed. R. Crim. P. 29(c). Defendant was charged in a single count Indictment with conspiracy to possess marijuana with intent to distribute. On July 13, 1993, a jury found defendant guilty. Defendant's motion does not claim that there was not an agreement to possess and distribute marijuana. Instead, his motion argues that the evidence was insufficient to prove that he joined the conspiracy.

The standard of review for claims of insufficient evidence is "whether after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 319 (1979) (emphasis in original); United States v. Boling, 869 F.2d 965 (6th Cir. 1989). Reviewing the evidence in the light most favorable to the government means that I must make all credibility choices and inferences

in a manner that supports the jury's verdict. Further, circumstantial evidence alone is sufficient to sustain a conviction and such evidence need not remove every reasonable hypothesis except that of guilt. United States v. Stone, 748 F.2d 361, 363 (6th Cir. 1984).

The evidence presented against Carlisle at trial was as follows. On the evening of April 10, 1993, defendant Rupert (Carlisle's common-law wife), defendant Ramon (Ms. Rupert's mother), and Thomas Crawford arrived at the residence on Yale Street that Carlisle and Rupert shared. Ramon travelled in a car driven by Rupert, and they were followed by a truck full of marijuana. That truck was driven by Crawford, the government's primary witness, who was wearing a tape-recording device at the time.

In his opening statement, defendant's counsel stated that Rupert told Carlisle that the truck contained marijuana, and that she was scared. The inference that Carlisle knew that the truck contained marijuana could also be drawn from a hearsay statement by Rupert I admitted. As soon as Ramon, Rupert and Crawford arrived at the Yale Street residence, Crawford recorded the following statement of Rupert: "Okay, just pull out and Chuck [Carlisle] says to go down the street and just park for awhile because he said he's heard over the scanner, there's some cops around here." Exhibit 48-A, Transcript of Nagra Tape #2, Cassette #1A, p. 5. Crawford parked the truck down the street.

When Crawford returned from parking the truck, he was introduced to Carlisle. Crawford testified that Carlisle was quiet

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and did not appear nervous. At this point, the parties appear to be discussing where to park the truck for the evening, and the following conversation ensued:

Ramon: We can park it behind the house.

Crawford: All right mighty good.

Carlisle: Figure right down the drive.

Ramon: Yeah, because my son called, my grandson called and said there was cops around here.

Rupert: around this area

Ramon: unintelligible

Rupert: and we don't want to take a chance right now

Carlisle: We don't want to take no chances.

Crawford: No, un uh, that's why I was going, I, the speed limit was thirty and so I stayed right on it.

Ramon: Yeah? Oh and before I forget, on the key, the combination. I took the thing off and I put it on there so . . .

Carlisle: Okay . . . is that for the back?

*** (one page later) ***

Ramon: We're going (unintelligible)

Crawford: Oh yeah it's best not take any . . .

Carlisle: No I won't take no chances . . .

Crawford: Okay.

Id. at 5-7.

At Rupert's request, Carlisle then drove Amelia Ramon to her home shortly after Rupert, Ramon and Crawford arrived at the Yale

Street residence. The truck full of marijuana, driven by Crawford, followed. The truck was left at Ramon's home, and Crawford joined Carlisle and Ramon in the car. Carlisle then drove Crawford and Ramon to the Stouffer Hotel. During this trip, tape recordings indicated that there was nothing but casual banter about topics such as cars and the city of Battle Creek. Carlisle dropped them off and left. There was no evidence that Carlisle had any further contact with any member of the conspiracy.

Upon review under the foregoing standards, I find that the evidence in this case is sufficient to sustain defendant's conviction. Viewed in the light most favorable to the government, I believe that a rational trier of fact could find beyond a reasonable doubt that Carlisle knew about the conspiracy, and that Carlisle knowingly and voluntarily joined the conspiracy.

Instruction 10C explained that in order to establish knowing and voluntary joinder,

> the government must prove that [the defendant] knew the conspiracy's main purpose, and that he voluntarily joined it intending to help advance or achieve his goals. . . . But proof that a defendant simply knew about a conspiracy, or was present at the time, or associated with members of the group, is not enough, even if he approved of what was happening or did not object to it. Similarly, just because a defendant may have done something that happened to help a conspiracy does not necessarily make him a conspirator. These are all things that you may consider in deciding whether the government has proved that a defendant joined a conspiracy. But without more they are not enough.

Sixth Circuit Pattern Criminal Instruction No. 3.03 (1991).[1] Review of two cases in which the Sixth Circuit found that the government did not carry the burden described above is instructive. In the unpublished decision of United States v. Burgess, 1992 U.S. App. LEXIS 34740 (6th Cir.), the court acknowledged that "[c]onspiracy cases often present difficult questions about the extent to which seemingly passive participants are nonetheless culpable members of the conspiracy." Id. at *21. The appellate panel went on to hold that there was insufficient evidence to support defendant Burgess' conviction for conspiracy to possess marijuana with intent to distribute. In Burgess, a defendant named Muncy planned to buy marijuana from a DEA agent and informant. Muncy drove to the scheduled rendezvous point with Burgess and a third defendant, Rose. When they arrived, Muncy walked to the agents' car and discussed the purchase. Muncy then went back to his own car and brought Rose to the agents' car with him. After the transaction began, all three were arrested. A search of the car revealed a loaded revolver and $15,000 in cash in the front seat, and scales in the trunk.

Upon review of these facts, the Sixth Circuit concluded that the jury could have inferred Burgess' knowledge of the purpose of the trip, White's possession of money to purchase marijuana, and

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[1] The Committee Notes cite many cases in support of this instruction. E.g., United States v. Richardson, 596 F.2d 157, 162 (6th Cir. 1979) (there must be proof of an intention an agreement to cooperate in the crime); United States v. Bostic, 480 F.2d 965, 968 (6th Cir. 1973) (there must be intentional participation in the transaction with a view to the furtherance of the common design and purpose).

even the presence of a weapon in the car. However, because Burgess did not participate in the discussions with the agents, he was not mentioned in those conversations, he did not drive the car, and he never left the middle of the front seat, the court held that a rational trier of fact could not find that Burgess knowingly and voluntarily joined the conspiracy.

United States v. Pearce, 912 F.2d 159 (6th Cir. 1990), cert. denied sub nom Thorpe v. United States, 111 S.Ct. 978 (1991), provides another example of evidence which the Sixth Circuit found to be insufficient to sustain a conspiracy conviction. Defendants Thorpe and Pearce were convicted of conspiring to possess and distribute crack in violation of 21 U.S.C. § 846 on the following evidence. A SWAT team entered what they suspected was a crack house after an informant purchased crack at the house with registered bills. When they entered, Thorpe ran into the basement yelling "it's a bust." The SWAT team found Thorpe nearby two doses of crack and a loaded revolver. Thorpe had a live round in his pocket that matched those found in the gun. The police found Pearce sitting on a couch in the living room. Next to him was a bag of crack and the registered bills the informant used in his purchase.

The Sixth Circuit reversed both conspiracy convictions. It found that the record was devoid of any evidence that Thorpe and Pearce had entered into an agreement. Although the defendants' presence at the house was unexplained, the court concluded that no rational trier of fact could have found that even tacit coordination between Thorpe, Pearce, or any third party, to maintain a crack house or to distribute crack.

The evidence against Mr. Carlisle surpasses that presented in Burgess and Pearce. Unlike the Burgess defendant, he was more than just present during the conspiracy. He took actions to help hide the contraband from the police. He stated his intention to not "take chances." He inquired whether a key unlocked the back of the truck which contained the marijuana. And finally, in contrast to the Pearce defendants, Mr. Carlisle's use of the word "we" in a statement made to other conspirators during a conversation about where to put the truck full of marijuana to avoid the place, "we don't want to take no chances," could indicate joinder with the conspiracy to a rational trier of fact. I find that Carlisle's hearsay statement concerning the scanners, his statements evincing a desire to avoid the police, and the fact that he drove a conspirator (his common law mother-in-law) to her home, and then drove two conspirators to a hotel and dropped them off, is sufficient for a rational trier of fact to find that he knowingly and voluntarily joined the conspiracy.

Viewing the evidence in the light most favorable to the government, I find that the government's case against Charles Carlisle is sufficient to prove beyond a reasonable doubt that Carlisle knowingly and voluntarily joined the conspiracy. As a result, defendant's motion will be denied.

Dated in Kalamazoo, MI:

May 19, 1993

Richard A. Enslen

RICHARD A. ENSLEN
United States District Judge

FILED (K)

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BY RG

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF MICHIGAN

UNITED STATES OF AMERICA,

Plaintiff,

v

CHARLES CARLISLE,

Defendant.

File No. 1:93:CR:66-02

HON. RICHARD A. ENSLEN

ORDER

In accordance with the Opinion entered on this date;

IT IS HEREBY ORDERED that defendant Carlisle's motion for a judgment of acquittal pursuant to Rule 29(c), filed July 23, 1993, **is DENIED.**

Dated in Kalamazoo, MI:

Aug 19, 1993

RICHARD A. ENSLEN
United States District Judge

101

(6)

Supreme Court, U.S.
FILED
NOV 7 1995
CLERK

No. 94-9247

In The

Supreme Court of the United States

October Term, 1995

CHARLES CARLISLE,

Petitioner,

vs.

UNITED STATES OF AMERICA.

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

JOINT APPENDIX

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Petition For Certiorari Filed May 12, 1995
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07/23/93	Petitioner's Motion for a Judgment of Acquittal Pursuant to Federal Rule of Criminal Procedure 29(c) and Brief in Support of Motion
07/30/93	Government's Response to Petitioner's Motion for Acquittal and Brief in Support of Response
08/24/93	District Court's Opinion Denying Motion for Acquittal
08/24/93	District Court's Order Denying Motion for Acquittal
10/14/93	Transcript of Sentencing/Discharge held on October 14, 1993
10/28/93	District Court's Opinion
10/28/93	District Court's Judgment Withdrawing Court's 08/24/93 Opinion and Order and Granting Petitioner's Motion for Acquittal
02/21/95	Opinion of the United States Court of Appeals for the Sixth Circuit
07/07/95	Judgment

UNITED STATES OF AMERICA

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

vs.

IGNACIO AMBRIZ,
CHARLES CARLISLE,
DOLORES RUPERT,
TIMOTHY SMITH,
MICHAEL HALL,
AMELIA RAMON, and
ISREAL ALMEDIA,

Defendants.

No. 1:93:CR:66

Hon. Richard A. Enslen

INDICTMENT

The Grand Jury charges:

COUNT ONE

(MARIJUANA CONSPIRACY)

From on or about April 1, 1993, until on or about April 11, 1993, in Calhoun County, in the Western District of Michigan, Southern Division, and elsewhere,

IGNACIO AMBRIZ,
CHARLES CARLISLE,
DOLORES RUPERT,
TIMOTHY SMITH,

MICHAEL HALL,
AMELIA RAMON, and
ISREAL ALMEDIA,

did knowingly, willfully, and unlawfully combine, conspire, confederate and agree with Thomas Crawford and persons known and unknown to the grand jury to knowingly and intentionally possess with intent to distribute marijuana, a schedule I controlled substance, in violation of 21 United States Code, Sections 841 and 846.

OVERVIEW OF THE CONSPIRACY

On April 8, 1993, the Missouri State Police intercepted a U-Haul van driven by Thomas Crawford. The van contained approximately 240 pounds of marijuana and some household goods. Crawford said he was en route from Texas to the Battle Creek, Michigan, area where he was to deliver the marijuana. On April 9, 1993, Crawford arrived in Battle Creek and called the person to whom he was to deliver the marijuana. During April 10 and 11 the marijuana was moved several times in the Battle Creek area, finally settling in a locker rented by Amelia Ramon in a storage facility on the outskirts of Battle Creek. To effect the objects of the conspiracy, at least one co-conspirator did at least one of the following overt acts:

OVERT ACTS

1. On or about April 9, 1993, AMELIA RAMON instructed Thomas Crawford to remain in his hotel with the 240 pounds of marijuana he had driven to Battle

Creek from Texas until a co-conspirator arrived from Texas.

2. On or about April 10, 1993, Thomas Crawford met with AMELIA RAMON and DOLORES RUPERT, a/k/a Lolita to discuss the movement of the 240 pounds of marijuana he had transported from Texas. Crawford was informed by AMELIA RAMON that they would move the marijuana as soon as IGNACIO AMBRIZ, a/k/a Bobby Ambriz, arrived from Texas.

3. On or about April 10, 1993, DOLORES RUPERT led Thomas Crawford, driving the van with 240 pounds of marijuana, to her residence at 218 Yale Street, Battle Creek, Michigan, with the intent to conceal the marijuana there.

4. On or about April 10, 1993, DOLORES RUPERT and CHUCK CARLISLE led Thomas Crawford, driving the van with 240 pounds of marijuana, to 315 Elm Street, Battle Creek, Michigan, with the intent to conceal the marijuana there.

5. On or About April 10, 1993, CHUCK CARLISLE drove Thomas Crawford and AMELIA RAMON to a hotel in Battle Creek where they met with IGNACIO AMBRIZ and ISREAL ALMEDIA. The quartet discussed the off-loading and distribution of marijuana and the distribution of the proceeds.

6. On or about April 11, 1993, Thomas Crawford, ISREAL ALMEDIA, AMELIA RAMON and a female named Lupe (LNU) met at a hotel and discussed moving the 240 pounds of marijuana in the U-Haul van.

7. On or about April 11, 1993, TIMOTHY SMITH drove the U-Haul van, containing 240 pounds of marijuana, from 315 Elm Street, Battle Creek, Michigan, to a storage facility, with the intent to conceal the marijuana there.

8. On or about April 11, 1993, MICHAEL HALL and AMELIA RAMON used an automobile to conduct surveillance of the U-Haul van containing 240 pounds of marijuana on its way to the storage facility.

9. On or about April 11, 1993, AMELIA RAMON and Lupe (LNU) rented a locker at a storage facility with the intent to store the 240 pounds of marijuana brought to Battle Creek by Thomas Crawford there.

21 U.S.C. § 841
21 U.S.C. § 846
18 U.S.C. § 2

A TRUE BILL

/s/ Barbara Novak
GRAND JURY FOREPERSON

JOHN A. SMIETANKA
United States Attorney

/s/ James R. Redford
JAMES R. REDFORD (38462)
Assistant United States Attorney
United States Attorney's Office
399 Federal Building
Grand Rapids, Michigan 49503

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN

(Caption Omitted In Printing)

DEFENDANT CARLISLE'S MOTION FOR A JUDGMENT OF ACQUITTAL PURSUANT TO FEDERAL RULE OF CRIMINAL PROCEDURE 29(c)

Defendant, through his attorneys, GEMRICH, MOSER, BOWSER, FETTE & LOHRMANN, moves this Court for the entry of Judgment of Acquittal, pursuant to Federal Rule of Criminal Procedure 29(c). A brief in support of this Motion is attached.

Dated:
July 23, 1993

GEMRICH, MOSER, BOWSER,
FETTE & LOHRMANN

By: /s/ Scott Graham
Scott Graham
Attorney for Defendant
BUSINESS ADDRESS:
222 South Westnedge
Avenue
Kalamazoo, MI 49007
(616) 382-1030

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN

(Caption Omitted In Printing)

BRIEF IN SUPPORT OF DEFENDANT CARLISLE'S MOTION FOR JUDGMENT OF ACQUITTAL PURSUANT TO FEDERAL RULE OF CRIMINAL PROCEDURE 29(c)

Defendant was charged in a single count Indictment with conspiracy to possess marijuana with intent to distribute. On July 14, 1993, following jury trial, Defendant was found guilty. This Court discharged the jury following the verdict. Defendant requests this Court to enter a Judgement of Acquittal in this matter pursuant to Federal Rule of Criminal Procedure 29(c). Petitioner contends that such a Judgment is appropriate where no rational trier of fact could have determined that Defendant was guilty of the charge contained in the Indictment.

This Court is well aware of the standard of review for evaluation of a motion pursuant to Rule 29(c). The Court must determine whether viewing the evidence in the light most favorable to the government, a rational trier of fact could have found the elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). Here, Defendant contends that no rational trier of fact could have found that he intended to joint [sic] the conspiracy.

The evidence at trial demonstrated that, prior to coming to Michigan, Thomas Crawford had not heard of Defendant Carlisle. On the evening of April 10, Delores Rupert told Crawford that Rupert would lead Crawford

to her house and that she would then take Crawford to the Stouffers Hotel in Battle Creek.

Rupert then drove a car to her residence at 218 Yale Street, followed by Crawford. Amelia Ramon traveled with Rupert.

Crawford tried to pull the U-Haul truck into the driveway at 218 Yale. Rupert approached him and told him to move the truck down the street. Defendant Carlisle then drove Ramon to the Elm Street address, where Crawford left the truck. Carlisle then drove Ramon and Crawford to the Stouffers Hotel. During this trip, there was no discussion or drug activity. There is no evidence that Carlisle had any further contact with any member of the alleged conspiracy.

Based upon these facts, it is impossible to conclude Carlisle "joined" the conspiracy. There is no indication that Carlisle did anything more than assist Ramon and Crawford in traveling to the Stouffers in an effort to cause Crawford to move the truck away from the 218 Yale Street address. This alone does not prove the elements of the offense.

CONCLUSION

For these reasons, Defendant requests this Court to enter a Judgment of acquittal in this matter pursuant to Federal Rule of Criminal Procedure 29(c).

Dated:
July 23, 1993

GEMRICH, MOSER, BOWSER,
FETTE & LOHRMANN

By: /s/ Scott Graham
Scott Graham
Attorney for Defendant
BUSINESS ADDRESS:
222 South Westnedge
Avenue
Kalamazoo, MI 49007
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UNITED STATES OF AMERICA

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

vs.

CHARLES CARLISLE,

Defendant.

/

No. 1:93:CR:66

Hon. Richard A. Enslen

GOVERNMENT'S RESPONSE TO DEFENDANT CARLISLE'S MOTION FOR JUDGMENT OF ACQUITTAL PURSUANT TO FEDERAL RULE OF CRIMINAL PROCEDURE 29(c)

Now comes the United States of America, by and through its attorneys, John A. Smietanka, United States Attorney for the Western District of Michigan, and James R. Redford, Assistant United States Attorney, and in its response to Defendant's Motion for Judgment of Acquittal after the discharge of the jury states as follows:

The Motion for a Judgment of Acquittal should be denied based on the motion being untimely and

unsupported by an analysis of the case as further set forth in the brief in support of this response.

Respectfully submitted,

JOHN A. SMIETANKA
United States Attorney

Dated: July 28, 1993

/s/ James R. Redford
JAMES R. REDFORD
(P38462)
Assistant United States Attorney
399 Federal Building
Grand Rapids, Michigan
49503
(616) 456-2404

UNITED STATES OF AMERICA

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION

(CAPTION OMITTED IN PRINTING)

BRIEF IN SUPPORT OF GOVERNMENT'S RESPONSE TO DEFENDANT CARLISLE'S MOTION FOR JUDGMENT OF ACQUITTAL PURSUANT TO FEDERAL RULE OF CRIMINAL PROCEDURE 29(c)

Now comes the United States of America, by and through its attorneys, John A. Smietanka, United States Attorney for the Western District of Michigan, and James R. Redford, Assistant United States Attorney, and in its Brief in Support of its Response to Defendant's Motion for Judgment of Acquittal states as follows:

Federal Rule of Criminal Procedure 29(c) provides that a Defendant may, after the jury returns a verdict of guilty, bring a motion for judgment of acquittal within seven days after the jury is discharged. The jury in the instant case was discharged on July 13, 1993. The motion of Defendant Carlisle was made on July 23, 1993. Federal Rule of Criminal Procedure 45(a) provides that "when a period of time prescribed or allowed [for filing] is less than 11 days, intermediate Saturdays and holidays shall be excluded in the computation." Excluding Saturday, July 17 and Sunday, July 18, 1993 from the computation period, the seven day period within which Defendant Carlisle had to file his motion under Rule 29(c) ended on July 22, 1993. The filing of the motion on July 23 is

outside of the time period allowed by the rule and therefore denies this Court jurisdiction to review the motion. *See, United States v. Henshaw,* 687 F. Supp. 183 (E.D. Pa. 1988), *aff'd without op.,* 862 F.2d 311 (3rd Cir. 1988) (defendant's motion for a judgment of acquittal being filed eight court business days after jury's verdict was recorded and jury was discharged was untimely.)

Should the Court examine the merits of the motion of the Defendant, the standard of review is whether taking the evidence in the light most favorable to the Government, a rational trier of fact could have found the elements of the crime beyond a reasonable doubt. *Jackson v. Virginia,* 443 U.S. 307, 319 (1979). *See also, United States v. Montgomery,* 980 F.2d 388 (6th Cir. 1992); *United States v. Ingruo,* 844 F.2d 314, 315 (6th Cir. 1988); and *Kowalchuk v. United States,* 176 F.2d 873 (6th Cir. 1949).

In the instant case, Defendant Carlisle was shown through his actions and his statements to be a member of the conspiracy to possess with intent to distribute marijuana in the Western District of Michigan. His actions regarding the leading of the vehicle containing the marijuana as well as his failing to object to the presence of the marijuana clearly indicated to the trier of fact that he was a member of the agreement and that the purpose of the agreement was to possess with intent to distribute marijuana.

The Government respectfully submits that the motion is unsupported by the analysis of the facts as presented at trial and respectfully prays the motion be denied as

untimely and, in the alternative, that it be denied as unfounded in fact and law.

Respectfully submitted,

JOHN A. SMIETANKA
United States Attorney

Dated: July 28, 1993 /s/ James R. Redford
JAMES R. REDFORD
(P38462)
Assistant United States Attorney
399 Federal Building
Grand Rapids, Michigan
49503
(616) 456-2404

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN

UNITED STATES
OF AMERICA,

Plaintiff,

v

CHARLES CARLISLE,

Defendant.
_____/

File No. 1:93:CR:66-02

HON. RICHARD A. ENSLEN

OPINION

The matter before the Court is defendant Carlisle's motion for a judgment of acquittal pursuant to Fed. R. Crim. P. 29(c). Defendant was charged in a single count Indictment with conspiracy to possess marijuana with intent to distribute. On July 13, 1993, a jury found defendant guilty. Defendant's motion does not claim that there was not an agreement to possess and distribute marijuana. Instead, his motion argues that the evidence was insufficient to prove that he joined the conspiracy.

The standard of review for claims of insufficient evidence is "whether after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact cold have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979) (emphasis in original); *United States v. Boling*, 869 F.2d 965 (6th Cir. 1989). Reviewing the evidence in the light most favorable to the government

means that I must make all credibility choices and inferences in a manner that supports the jury's verdict. Further, circumstantial evidence alone is sufficient to sustain a conviction and such evidence need not remove every reasonable hypothesis except that of guilt. *United States v. Stone*, 748 F.2d 361, 363 (6th Cir. 1984).

The evidence presented against Carlisle at trial was as follows. On the evening of April 10, 1993, defendant Rupert (Carlisle's common-law wife), defendant Ramon (Ms. Rupert's mother), and Thomas Crawford arrived at the residence on Yale Street that Carlisle and Rupert shared. Ramon travelled in a car driven by Rupert, and they were followed by a truck full of marijuana. That truck was driven by Crawford, the government's primary witness, who was wearing a tape-recording device at the time.

In his opening statement defendant's counsel stated that Rupert told Carlisle that the truck contained marijuana, and that she was scared. The inference that Carlisle knew that the truck contained marijuana could also be drawn from a hearsay statement by Rupert I admitted. As soon as Ramon, Rupert and Crawford arrived at the Yale Street residence, Crawford recorded the following statement of Rupert: "Okay, just pull out and Chuck [Carlisle] says to go down the street and just park for awhile because he said he's heard over the scanner, there's some cops around here." Exhibit 48-A, Transcript of Nagra Tape #2, Cassette #1A, p. 5. Crawford parked the truck down the street.

When Crawford returned from parking the truck, he was introduced to Carlisle. Crawford testified that Carlisle was quiet and did not appear nervous. At this point, the parties appear to be discussing where to park the truck for the evening, and the following conversation ensued:

Ramon:	We can park it behind the house.
Crawford:	All right mighty good.
Carlisle:	Figure right down the drive.
Ramon:	Yeah, because my son called, my grandson called and said there was cops around here.
Rupert:	around this area
Ramon:	unintelligible
Rupert:	and we don't want to take a chance right now
Carlisle:	We don't want to take no chances.
Crawford:	No, un uh, that's why I was going, I, the speed limit was thirty and so I stayed right on it.
Ramon:	Yeah? Oh and before I forget, on the key, the combination. I took the thing off and I put it on there so . . .
Carlisle:	Okay . . . is that for the back?
	* * * (one page later) * * *
Ramon:	We're going (unintelligible)
Crawford:	Oh yeah it's best not take any . . .

Carlisle: No I won't take no chances . . .

Crawford: Okay.

Id. at 5-7.

At Rupert's request, Carlisle then drove Amelia Ramon to her home shortly after Rupert, Ramon and Crawford arrived at the Yale Street residence. The truck full of marijuana, driven by Crawford, followed. The truck was left at Ramon's home, and Crawford joined Carlisle and Ramon in the car. Carlisle then drove Crawford and Ramon to the Stouffer Hotel. During this trip, tape recordings indicated that there was nothing but casual banter about topics such as cars and the city of Battle Creek. Carlisle dropped them off and left. There was no evidence that Carlisle had any further contact with any member of the conspiracy.

Upon review under the foregoing standards, I find that the evidence in this case is sufficient to sustain defendant's conviction. Viewed in the light most favorable to the government, I believe that a rational trier of fact could find beyond a reasonable doubt that Carlisle knew about the conspiracy, and that Carlisle knowingly and voluntarily joined the conspiracy.

Instruction 10C explained that in order to establish knowing and voluntary joinder,

> the government must prove that [the defendant] knew the conspiracy's main purpose, and that he voluntarily joined it intending to help advance or achieve his goals. . . . But proof that a defendant simply knew about a conspiracy, or was present at the time, or associated with members of the group, is not enough, even if he

> approved of what was happening or did not object to it. Similarly, just because a defendant may have done something that happened to help a conspiracy does not necessarily make him a conspirator. These are all things that you may consider in deciding whether the government has proved that a defendant joined a conspiracy. But without more they are not enough.

Sixth Circuit Pattern Criminal Instruction No. 3.03 (1991).[1] Review of two cases in which the Sixth Circuit found that the government did not carry the burden described above is instructive. In the unpublished decision of *United States v. Burgess*, 1992 U.S. App. LEXIS 34740 (6th Cir.), the court acknowledged that "[c]onspiracy cases often present difficult questions about the extent to which seemingly passive participants are nonetheless culpable members of the conspiracy." *Id.* at *21. The appellate panel went on to hold that there was insufficient evidence to support defendant Burgess' conviction for conspiracy to possess marijuana with intent to distribute. In *Burgess*, a defendant named Muncy planned to buy marijuana from a DEA agent and informant. Muncy drove to the scheduled rendezvous point with Burgess and a third defendant, Rose. When they arrived, Muncy walked to the agents' car and discussed the purchase. Muncy then went back to his own car and brought

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[1] The Committee Notes cite many cases in support of this instruction. *E.g., United States v. Richardson*, 596 F.2d 157, 162 (6th Cir. 1979) (there must be proof of an intention an [sic] agreement to cooperate in the crime); *Untied States v. Bostic*, 480 F.2d 965, 968 (6th Cir. 1973) (there must be intentional participation in the transaction with a view to the furtherance of the common design and purpose).

Rose to the agents' car with him. After the transaction began, all three were arrested. A search of the car revealed a loaded revolver and $15,000 in cash in the front seat, and scales in the trunk.

Upon review of these facts, the Sixth Circuit concluded that the jury could have inferred Burgess' knowledge of the purpose of the trip, White's possession of money to purchase marijuana, and even the presence of a weapon in the car. However, because Burgess did not participate in the discussions with the agents, he was not mentioned in those conversations, he did not drive the car, and he never left the middle of the front seat, the court held that a rational trier of fact could not find that Burgess knowingly and voluntarily joined the conspiracy.

United States v. Pearce, 912 F.2d 159 (6th Cir. 1990), *cert. denied sub nom Thorpe v. United States*, 111 S.Ct. 978 (1991), provides another example of evidence which the Sixth Circuit found to be insufficient to sustain a conspiracy conviction. Defendants Thorpe and Pearce were convicted of conspiring to possess and distribute crack in violation of 21 U.S.C. § 846 on the following evidence. A SWAT team entered what they suspected was a crack house after an informant purchased crack at the house with registered bills. When they entered, Thorpe ran into the basement yelling "it's a bust." The SWAT team found Thorpe nearby two doses of crack and a loaded revolver. Thorpe had a live round in his pocket that matched those found in the gun. The police found Pearce sitting on a couch in the living room. Next to him was a bag of crack and the registered bills the informant used in his purchase.

The Sixth Circuit reversed both conspiracy convictions. It found that the record was devoid of any evidence that Thorpe and Pearce had entered into an agreement. Although the defendants' presence at the house was unexplained, the court concluded that no rational trier of fact could have found that even tacit coordination between Thorpe, Pearce, or any third party, to maintain a crack house or to distribute crack.

The evidence against Mr. Carlisle surpasses that presented in *Burgess* and *Pearce*. Unlike the *Burgess* defendant, he was more than just present during the conspiracy. He took actions to help hide the contraband from the police. He stated his intention to not "take chances." He inquired whether a key unlocked the back of the truck which contained the marijuana. And finally, in contrast to the *Pearce* defendants, Mr. Carlisle's use of the word "we" in a statement made to other conspirators during a conversation about where to put the truck full of marijuana to avoid the place, "we don't want to take no chances," could indicate joinder with the conspiracy to a rational trier of fact. I find that Carlisle's hearsay statement concerning the scanners, his statements evincing a desire to avoid the police, and the fact that he drove a conspirator (his common law mother-in-law) to her home, and then drove two conspirators to a hotel and dropped them off, is sufficient for a rational trier of fact to find that he knowingly and voluntarily joined the conspiracy.

Viewing the evidence in the light most favorable to the government, I find that the government's case against Charles Carlisle is sufficient to prove beyond a reasonable doubt that Carlisle knowingly and voluntarily joined

the conspiracy. As a result, defendant's motion will be denied.

Dated in Kalamazoo, MI:
Aug 19, 1993

/s/ Richard A. Enslen
RICHARD A. ENSLEN
United States
District Judge

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN

UNITED STATES
OF AMERICA,

Plaintiff,

v

CHARLES CARLISLE,

Defendant.
_____/

File No. 1:93:CR:66-02
HON. RICHARD A. ENSLEN

ORDER

In accordance with the Opinion entered on this date;

IT IS HEREBY ORDERED that defendant Carlisle's motion for a judgment of acquittal pursuant to Rule 29(c), filed July 23, 1993, is **DENIED.**

Dated in Kalamazoo, MI:
Aug 19, 1993

/s/ Richard A. Enslen
RICHARD A. ENSLEN
United States
District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA Plaintiff, VS. CHARLES CARLISLE, Defendant.	DOCKET NO. 1:93:CR:66 OCTOBER 14, 1993. Federal Building, KALAMAZOO, MICHIGAN.

TRANSCRIPT OF SENTENCING
PROCEEDING/DISCHARGE

BEFORE: HONORABLE RICHARD A ENSLEN, UNITED STATES DISTRICT COURT JUDGE.

[2] OCTOBER 14, 1993 KALAMAZOO, MICHIGAN.

THE COURT: The first comment that I have to make is one of decorum. I know that there are a lot of people here that I am sure are here for more than one of the defendants. I insist on absolute silence in the courtroom at all times, and I expect the Marshals and the court officers to carry that forward.

The Court first turns to the case of United States versus Charles Carlisle. It is the Court's file number 1:93:CR:66:2.

In this case on the 12th of April a complaint was filed which later led to an indictment. The indictment was filed I think later in April of 1993, charging six defendants with conspiracy to possess with intent to distribute marijuana in violation of Title 21 United States Code, sections 846 and 841(a)(1).

The case was tried in July with some of the defendants, and on July 13, a jury returned a guilty verdict against Charles Carlisle, Dolores Rupert, Michael Hall, and Amelia Ramon for their part in the one-count indictment charging the marijuana conspiracy. One defendant, Timothy Smith, received a directed verdict of acquittal.

Following the conviction of Mr. Carlisle, his bond was revoked as required, and the Court ordered a presentence report to be prepared, and it was prepared. Mark [3] Restum from the United States Probation Office prepared the report. There were, are a number of unresolved objections to the presentence report today.

Mr. Redford, who prosecuted the case, appears for the government; and the defendant, Mr. Carlisle, appears as does his lawyer, Mr. Graham, Scott Graham.

This morning the Court talked to Mr. Redford, who was here on another trial, and Mr. Graham by telephone, and the lawyer for Ms. Rupert, whose name momentarily escapes me, and the lawyer for Mr. Hall, whose name also escapes me for the moment; and I told them that I had read a case from the Fourth Circuit involving the mandatory minimum guidelines and the responsibility assigned to an individual defendant relating to quantity; and I told them that they should be aware of this and prepared to do two things this afternoon:

One, to argue how the law applies; and secondly, to offer evidence as to the quantity attributable to the defendant under consideration.

That is what I told everybody, I hope. I actually talked to Mr. Redford myself, and I talked to Mr. Graham myself. I did not talk to the two lawyers. I assigned that job to one of my law clerks I believe.

That is the basic setting. The record may not show what I am talking about; so I am going to say a couple of things and only a couple. I don't have that. This will [4] take a few moments.

While she is looking for it, I think I told both Mr. Graham and Mr. Redford that my attention was called to a case in a publication called *Sentencing Guidelines,* that publication I believe to be produced by the Federal Judicial Center, and I believe to be directed to district and circuit judges, and Supreme Court Justices. It is possibly a once-a-month publication. It may come out more often. It highlights sentences around the country on the Sentencing Guidelines. It started about 1987 and continues to come. It used to come more frequently than it does now because the decisions were newer.

And in it I found the Fourth Circuit case which was highlighted this month, *United States versus Irvin.* Its official cite is 2 Fed. 3rd 72. Its LEXIS cite is 1993 21460. And in essence, the Fourth Circuit held the district courts must determine the quantity of narcotics reasonably foreseeable to each individual co-conspirator prior to a determination of the applicability of the mandatory minimum sentencing provisions of section 841.

In accord with *Irvin* is *U. S. vs. Martinez,* 987 Fed. 2nd 920, a Second Circuit decision in 1993; *United States vs. Conkins,* 987 Fed. 2nd 564 at 570, from the Ninth Circuit in 1993; *United States vs. Young,* 997 Fed. 2nd 1204 at 1210 from the Seventh Circuit in 1993; and [5] *United States vs. Rogers,* 982 Fed. 2nd 1241 at 1246 from the Eighth Circuit in 1993.

The Court indicated to both lawyers, I believe, that I had already looked at a Sixth Circuit case or two that were recent. I don't believe I gave either lawyer the cite for the Sixth Circuit case. Now I am going to give the lawyers the cite of the I think most important case in the Sixth Circuit. It is called *United States vs. Jenkins.* It is not reported yet. It is 1993 U. S. Appeals LEXIS 20967. It was decided on August 20th of this year. I think that it will be published. It is not yet published.

The Sixth Circuit endorsed the use of the so-called reasonably foreseeable standard to measure a co-conspirator's personal responsibility for an amount of drugs. It squarely addressed the question, I am now quoting from the Sixth Circuit, quote, "Whether a conspirator is properly found accountable for the full amount of drugs involved in the conspiracy based solely on the finding that the amount involved was foreseeable to him." End quote.

MR. REDFORD: What page is that, Your Honor?

THE COURT: I don't have a page cite for that quote. Yes, I do, too. 4. Star 4. See Start 4. And the "reasonably foreseeable" I have underlined myself. If you have it in front of you, both of you ought to [sic] able to

find it. It doesn't make any difference. You don't need to find [6] it. But I am still on the same case, and I am going to make another comment about it, because this comment goes farther than the Fourth Circuit goes. I am again quoting, and I hope that I know what page I am quoting from. It is 24 and 31. Star 24 to 31, actually through, from 24 through 31. There are ellipses here, Mr. Redford. You aren't going to be able to follow me that closely. So don't worry about it. I am now quoting between those pages.

"A co-conspirator is not necessarily responsible for the total amount of cocaine involved in the conspiracy for the process of establishing his Base Offense Level. Rather, a participant is responsible for other conspirator's conduct only if that conduct was reasonably foreseeable to him and in furtherance of the execution of the jointly undertaken criminal activity." I am going to skip some.

"However, foreseeability is only one of the limitations on the ability of a trial court to charge one participant in a conspiracy with the conduct of the other participants." Leaving out some more.

"In this case, the district court did not address, implicitly or explicitly, the scope of the criminal activity Vincent Sample agreed to jointly undertake."

Now that tells me in the Sixth Circuit as recently as August that there were two inquires [sic] the trial court would have to make: first, the reasonable foreseeability analysis; and even if the individual defendant reasonably foresaw the quantity, the Court had to move to the second issue – did he agree to join the conspiracy or the scope of the conspiracy for that amount. That is what I understand and believe that *Jenkins* stands for.

Of course, it would be the government's responsibility on a preponderance of the burden standard to show the Court, by a preponderance of the evidence, that the defendant reasonably foresaw the quantity involved in this conspiracy, and if he did, that he reasonably, that he, quote, the quote to the Court, "that he implicitly or explicitly joined the scope of the criminal activity."

It is doubtful to me that the prosecutor can do that. I have read the presentence report. There is nothing in the presentence report to suggest anything more than what I heard at trial, and I heard everything in trial.

However, the Court isn't even going to reach that issue. And I now put aside as redundant that issue. Because the Court, instead, is about to do something else; and to do something else, I have to let the lawyers enter my chambers. This is the first time that I have ever done that. So welcome in.

I wrote two opinions, Mr. Graham and Mr. Redford, in August of 1993. The opinion that you saw [8] denied your motion for a judgment of acquittal. The other granted it. I am now reversing myself and granting it. I am going to read you precisely my written opinion as I pulled it off the LEXIS 25 minutes ago, and I would ask you to turn to the August 24th opinion of the Court on the Carlisle motion for a directed verdict, for a judgment of acquittal, excuse me.

And I am going to read the things that are different about it.

That is to say, if I can find it. I have it.

Do either one of you have that?

MR. REDFORD: I have got it, Your Honor.

MR. GRAHAM: I don't.

MR. REDFORD: I will share it with him.

THE COURT: Share it. He will be glad to share this with you.

MR. REDFORD: I am not sure that he should.

THE COURT: The first paragraph is the same.

MR. REDFORD: I am sorry?

THE COURT: By the way, this is available for both of you up here.

The first paragraph is the same.

The "The standard of review" paragraph is the same.

The sentence starting with, rather, the [9] paragraph starting with "the evidence presented" is the same.

The next one beginning "In his opening statement" is the same.

"When Crawford returned" is the same.

The quotes thereafter from Ramon, Carlisle, and Crawford are all the same.

The paragraph beginning "At Rupert's request" is the same.

Starting with, "Upon review of the foregoing standards" – do you see that?

MR. REDFORD: No. Yes, Your Honor.

THE COURT: I now read to you from my first prepared opinion and hereby reverse myself, and return to the first opinion.

Upon review of the foregoing standards. I am sorry.

"Upon review of the evidence in this case under the foregoing standards, I find that it is not sufficient to sustain defendant's conviction. Viewed in the light most favorable to the government, I believe that a rational trier of fact could find beyond a reasonable doubt that" – excuse me.

"Viewed in the light most favorable to the government, I believe that a rational trier of fact could not (sic) find beyond a reasonable doubt that Carlisle knew [10] about the conspiracy. However" – strike it again. Let me try it a third time.

"Viewed in the light most favorable to the government, I believe that a rational trier of fact could find beyond a reasonable doubt that Carlisle knew about the conspiracy. However, I do not believe that a rational trier of fact could find beyond a reasonable doubt, as the jury was instructed in Instruction 10B that it must, that Carlisle knowingly and voluntarily joined the conspiracy. Instruction 10C explained that in order to establish knowing and voluntary joinder, quote, "the government must prove that the defendant knew the conspiracy's main purpose, and that he voluntarily joined it intending to help advance or achieve its goals."

Ellipsis.

"But proof that a defendant simply knew about a conspiracy, or was present at the time, or associated with

members of the group, is not enough, even if he approved of what was happening or did not object to it. Similarly, just because a defendant may have done something that happened to help a conspiracy does not necessarily make him a conspirator. These are all things that you may consider in deciding whether the government has proved that a defendant joined a conspiracy. But without more they are not enough."

End quote, citing Sixth Circuit Pattern [11] Criminal Instruction, 3.03, 1991. I added emphasis in my written opinion to "But without more they are not enough."

I continued.

"The Committee notes cite many cases in support of this instruction. E.g., *United States vs. Richardson*, 596 Fed. 2nd 157, at 162, Sixth Circuit in 1979." Parenthesis. "('There must be proof of an intention or an agreement to cooperate in the crime.'); *United States vs. Bostic*, 480 Fed. 2nd 965, at 968, in 1963. ('There must be intentional participation in the transaction with a view to the furtherance of the common design and purpose.')"

I then go back to the written opinion that you both have, I believe, that starts with a sentence that starts: "In the unpublished decision of *United States vs. Burgess*," and so on, and you will find that at the top of page 5.

MR. REDFORD: Got it, Your Honor.

THE COURT: I have that identically, and everything identically until I get to the facts of this case which is on the page where your page 7 begins with the paragraph: "The evidence against Mr. Carlisle."

Do you see that?

MR. REDFORD: I do, Your Honor.

THE COURT: Instead of that – and the sentence [12] below it and the paragraph above it are the same. In that paragraph, instead of what you see, this is what I have first written:

"The facts of this case require the same result as those in *Burgess and Pearce*. The government produced no evidence that Charles Carlisle entered into an agreement with any member of the conspiracy. Like the *Burgess*/ defendant, he was clearly present during the conspiracy, and the jury certainly could have found that he knew about it. However, in the course of hours of tape recorded conversations, no conspirators suggest that Carlisle is involved in this conspiracy. There was no evidence that he was involved in arranging the transport of the marijuana to Michigan. In fact, Crawford testified that prior to coming to Michigan he had never heard of Carlisle. Carlisle had never handled the drugs or the truck which contained them, and there was no evidence that Carlisle was to benefit from the conspiracy. I find that Carlisle's hearsay statement concerning scanners, and the fact that he drove a conspirator" – parenthesis – "(his common law mother-in-law) to her home, and then drove two conspirators to a hotel and dropped them off, is insufficient to establish that he knowingly and voluntarily joined the conspiracy."

Paragraph.

"Viewing the evidence in the light most [13] favorable to the government, I find that the government's case against Charles Carlisle is insufficient to prove beyond a reasonable doubt that Carlisle knowingly and voluntarily

joined the conspiracy. As a result, the defendant's motion will be granted."

The Court even prepared an order which it never signed, which reads: "In accordance with the opinion entered on this date, it is hereby ordered that the defendant Carlisle's motion for a judgment of acquittal pursuant to rule 29(c), filed July 23, 1993, is GRANTED. It is further ordered that the defendant Carlisle is to be discharged from custody."

Now I not only prepared that, but I have it in its original form and I never signed it. I went through a process of thinking. I have changed my mind when I wrote the opinion that you all see. I don't know that I have ever in my life written two opinions like this. But I did. I now say that I was wrong; and I was right the first time, and Mr. Carlisle is discharged. It is as simple as that. No, no, no noise, no demonstrations. Thank you.

MR. REDFORD: May we have a side bar? (Unrecorded side bar conference.)

THE COURT: Let's take a recess out here for a minute.

(Recess.)

[14] THE COURT: There was a brief recess in this proceeding while I talked with the two lawyers about a number of things, one or two of which I am going to put on the record, and also, to allow Mr. Redford to make a phone call that he wanted to make.

Part of the discussion in chambers had to do with a letter that the Court received from the defendant a few days ago. And the record should show that I have made

that letter available for the defense lawyer to see and the government lawyer to see, with the approval of the defense lawyer, and that it may be a sealed document following this appeal in the event that the government appeals.

Secondly, I discussed with the lawyers briefly that I had read the presentence report, which I guess ought to be obvious to everybody, and I note for the first time when I read the presentence report that Mr. Carlisle served his country in Vietnam in 1967 or 1968, and that while he was there he received the Bronze Star. The specific mention in the presentence report is just labeled paragraph 42.

It reads as follows. "On January 24, 1967, Charles Carlisle enlisted in the United States Army. The defendant was honorably discharged from service on January 24, 1969. While in the army, Mr. Carlisle served 11 months and 27 days in foreign service, participating in the Vietnam campaign. He received the Army Commendations Medal [15] and the Bronze Star. The defendant had a E-5 rank at separation. Mr. Carlisle stated he was proud to serve his country although he did not like what he saw regarding the injuries and casualties, and the feeling that he was, quote, losing family, end quote during his campaign. Mr. Carlisle served as a combat medic during his tour in Vietnam."

The Court doesn't meet too many Bronze Star recipients. Mr. Carlisle, on behalf of my country I thank you for your service in Vietnam. This is the end of this

proceeding. We will recess briefly and take up the matter of Ms. Rupert.

(Conclusion of Proceeding.)

United States District Court

For the Western District of Michigan

UNITED STATES OF AMERICA,
Plaintiff,

v

CHARLES CARLISLE,
Defendant.

File No. 1:93:CR:66-02
HON. RICHARD A. ENSLEN

OPINION

In accordance with the oral opinion delivered from the bench on October 14, 1993, and for the reasons given therein, this Court's Opinion and Order of August 19, 1993, is withdrawn. In its place, the Court enters the following Opinion and Judgment:

The matter before the Court is defendant Carlisle's motion for a judgment of acquittal pursuant to Fed. R. Crim. P. 29(c). Defendant was charged in a single count Indictment with conspiracy to possess marijuana with intent to distribute. On July 13, 1993, a jury found defendant guilty.[1] Defendant's motion does not claim that there

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[1] Rule 29(c) allows defendants seven days after the jury is discharged, "or within such further time as the court may fix during the 7-day period," to bring a motion for judgment of acquittal. The government correctly points out that this deadline occurred on July 22 in this case, but defendant's motion was filed on July 23. However, I can conceive of no prejudice to the United States which will result from consideration of a motion that is one day later in this case. Because I believe that refusal to hear this motion would result in grave injustice, and because the Rule permits the Court to extend the deadline, I will consider this motion as if it were filed in a timely manner.

was not an agreement to possess and distribute marijuana. Instead, his motion argues that the evidence was insufficient to prove that he joined the conspiracy.

The standard of review for claims of insufficient evidence is "whether after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979) (emphasis in original); *United States v. Boling*, 869 F.2d 965 (6th Cir. 1989). Reviewing the evidence in the light most favorable to the government means that I must make all credibility choices and inferences in a manner that supports the jury's verdict. Further, circumstantial evidence alone is sufficient to sustain a conviction and such evidence need not remove every reasonable hypothesis except that of guilt. *United States v. Stone*, 748 F.2d 361, 363 (6th Cir. 1984).

The evidence presented against Carlisle at trial was as follows. On the evening of April 10, 1993, defendant Rupert, Carlisle's common-law wife, defendant Ramon, Ms. Rupert's mother, and Thomas Crawford arrived at the residence on Yale Street that Carlisle and Rupert Shared. Ramon travelled in a car driven by Rupert, and they were followed by a truck full of marijuana. That truck was driven by Crawford, the government's primary witness, who was wearing a tape-recording device at the time.

In his opening statement, defendant's counsel stated that Rupert told Carlisle that the truck contained marijuana, and that she was scared. The inference that Carlisle knew that the truck contained marijuana could also be

drawn from a hearsay statement by Rupert I admitted. As soon as Ramon, Rupert and Crawford arrived at the Yale Street residence, Crawford recorded the following statement of Rupert: "Okay, just pull out and Chuck [Carlisle] says to go down the street and just park for awhile because he said he's heard over the scanner, there's some cops around here."[2] Cassette #1A, p. 5. Crawford parked the truck down the street.

When Crawford returned from parking the truck he was introduced to Carlisle. Crawford testified that Carlisle was quiet and did not appear nervous. At this point, the parties appear to be discussing where to park the truck for the evening, and the following conversation ensued:

Ramon:	We can park it behind the house.
Crawford:	All right might good.
Carlisle:	Figure right down the drive.
Ramon:	Yeah, because my son called, my grandson called and said there was cops around here.
Rupert:	around this area
Ramon:	unintelligible

---

[2] This hearsay statement was the only evidence that there was a scanner in the Carlisle/Rupert home. A neighbor testified that she had been in the home on a daily basis during the time period in question, and never saw a scanner. Further, Agent Munson testified that he had been in the house and the back bedrooms, and never saw a scanner.

Amelia Ramon made reference to her grandson picking up signals on scanners. That person does not reside in the Carlisle/Rupert residence.

Rupert: and we don't want to take a chance right now

Carlisle: We don't want to take no chances.

Crawford: No, uh uh, that's why I was going, I, the speed limit was thirty and so I stayed right on it.

Ramon: Yeah? Oh and before I forget, on the key, the combination. I took the thing off and I put it on there so . . .

Carlisle: Okay . . . is that for the back?

* * * (One page later) * * *

Ramon: We're going (unintelligible)

Crawford: Oh yeah its best not take any . . .

Carlisle: No I won't take no chances . . .

Crawford: Okay.

Id. at 5-7.

At Rupert's request, Carlisle then drove Amelia Ramon to her home shortly after Rupert, Ramon and Crawford arrived at the Yale Street residence. The truck full of marijuana, driven by Crawford, followed. The truck was left at Ramon's home, and Crawford joined Carlisle and Ramon in the car. Carlisle then drove Crawford and Ramon to the Stouffer Hotel. During this trip, tape recordings indicated that there was nothing but casual banter about topics such as cars and the city of Battle Creek. Carlisle dropped them off and left. There was no evidence that Carlisle had any further contact with any member of the conspiracy.

Upon review of the evidence in this case under the foregoing standards, I find that it is not sufficient to

sustain defendant's conviction. Viewed in the light most favorable to the government, I believe that a rational trier of fact could find beyond a reasonable doubt that Carlisle knew about the conspiracy. However, I do not believe that a rational trier of fact could find beyond a reasonable doubt, as the jury was instructed in Instruction 10B it must, that Carlisle knowingly and voluntarily joined the conspiracy. Instruction 10C explained that in order to establish knowing and voluntary joinder,

> the government must prove that [the defendant] knew the conspiracy's main purpose, and that he voluntarily joined it intending to help advance or achieve his goals. . . . But proof that a defendant simply knew about a conspiracy, or was present at the time, or associated with members of the group, is not enough, even if he approved of what was happening or did not object to it. Similarly, just because a defendant may have done something that happened to help a conspiracy does not necessarily make him a conspirator. These are all things that you may consider in deciding whether the government has proved that a defendant joined a conspiracy. **But without more they are not enough.**

Sixth Circuit Pattern Criminal Instruction No. 3.03 (1991) (emphasis added). The Committee Notes cite many cases in support of this instruction. *E.g., United States v. Richardson*, 596 F.2d 157, 162 (6th Cir. 1979) (there must be proof of an intention an [sic] agreement to cooperate in the crime); *United States v. Bostic*, 480 F.2d 965, 968 (6th Cir. 1973) (there must be intentional participation in the transaction with a view to the furtherance of the common design and purpose).

In the unpublished decision of *United States v. Burgess*, 1992 U.S. App. LEXIS 34740 (6th Cir.), the court acknowledged that "[c]onspiracy cases often present difficult questions about the extent to which seemingly passive participants are nonetheless culpable members of the conspiracy." *Id.* at *21. The appellate panel went on to hold that there was insufficient evidence to support defendant Burgess, conviction for conspiracy to possess marijuana with intent to distribute. In *Burgess*, a defendant named Muncy planned to buy marijuana from DEA agent and informant. Muncy drove to the scheduled rendezvous point with Burgess and a third defendant, Rose. When they arrived, Muncy walked to the agents' car and discussed the purchase. Muncy then went back to his own car and brought Rose to the agents' car with him. After the transaction began, all three were arrested. A search of the car revealed a loaded revolver and $15,000 in cash in the front seat, and scales in the trunk.

Upon review of these facts, the Sixth Circuit concluded that the jury could have inferred Burgess' knowledge of the purpose of the trip. White's possession of money to purchase marijuana, and even the presence of a weapon in the car. However, because Burgess did not participate in the discussions with the agents, he was not mentioned in those conversations, he did not drive the car, and he never left the middle of the front seat, the court held that a rational trier of fact could not find that Burgess knowingly and voluntarily joined the conspiracy.

United States v. Pearce, 912 F.2d 159 (6th Cir. 1990), *cert. denied sub nom Thorpe v. United States*, 111 S.Ct. 978 (1991), provides another example of evidence which the Sixth Circuit found to be sufficient to sustain a conspiracy

conviction. Defendants Thorpe and Pearce were convicted of conspiring to possess and distribute crack in violation of 21 U.S.C. § 846 on the following evidence. A SWAT team entered what they suspected was a crack house after an informant purchased crack at the house with registered bills. When they entered, Thorpe ran into the basement yelling "it's a bust." The SWAT team found Thorpe nearby two doses of crack and a loaded revolver. Thorpe had a live round in his pocket that matched those found in the gun. The police found Pearce sitting on a couch in the living room. Next to him was a bag of crack and the registered bills the informant used in his purchase.

The Sixth Circuit reversed both conspiracy convictions. It found that the record was devoid of any evidence that Thorpe and Pearce had entered into an agreement. Although the defendants' presence at the house was unexplained, the court concluded that the no rational trier of fact could have found that even tacit coordination between Thorpe, Pearce, or any third party, to maintain a crack house or to distribute crack.

The facts of this case require the same result as those in *Burgess* and *Pearce*. The government produced no evidence that Charles Carlisle entered into an agreement with any member of the conspiracy. Like the *Burgess* defendant, he was clearly present during the conspiracy, and the jury could have found that he knew about it. However, in the course of hours of tape recorded conversations, no conspirators suggest that Carlisle is involved in the conspiracy. There was no evidence that he was involved in arranging the transport of the marijuana to Michigan. In fact, Crawford testified that prior to coming

to Michigan, he had not heard of Carlisle. Carlisle never handled the drugs or the truck which contained them, and there was no evidence that Carlisle was to benefit from the conspiracy. I find that Carlisle's hearsay statement concerning the scanners, and the fact that he drove a conspirator (his common law mother-in-law) to her home, and then drove two conspirators to a hotel and dropped them off, is insufficient to establish that he knowingly and voluntarily joined the conspiracy.

Viewing the evidence in the light most favorable to the government, I find that the government's case against Charles Carlisle is insufficient to prove beyond a reasonable doubt that Carlisle knowingly and voluntarily joined the conspiracy. As a result, defendant's motion will be granted.

Dated in Kalamazoo, MI: "s/Richard A. Enslen"
October 27, 1993 RICHARD A. ENSLEN
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN

UNITED STATES OF AMERICA,
Plaintiff,

v

CHARLES CARLISLE,
Defendant.

File No.
1:93:CR:66-02
HON. RICHARD
A. ENSLEN

_____/

JUDGMENT

(Filed Oct 28, 1993)

In accordance with the Opinion entered on this date;

IT IS HEREBY ORDERED, in accord with the oral opinion delivered from the bench on October 14, 1993, and for the reasons given therein, this Court's Opinion and Order of August 19, 1993, is **WITHDRAWN**.

IT IS FURTHER ORDERED that defendant Carlisle's motion for a judgment of acquittal pursuant to Rule 29(c), filed July 23, 1993, is **GRANTED**.

Dated in Kalamazoo, MI: /s/ Richard A. Enslen
Oct. 27, 1993 RICHARD A. ENSLEN
United States District Judge

Nos. 93-2373/2380/2470; 94-1105

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* *v.* DELORES RUPERT (93-2373); MICHAEL HALL (93-2380); and AMELIA RAMON (94-1105), *Defendants-Appellants.*	ON APPEAL from the United States District Court for the Western District of Michigan
UNITED STATES OF AMERICA, *Plaintiff-Appellant,* *v.* CHARLES CARLISLE (93-2470), *Defendant-Appellee.*	

Decided and Filed February 21, 1995

Before: BROWN, RYAN, and BOGGS, Circuit Judges.

BOGGS, Circuit Judge. Rupert, Ramon, and Hall appeal their convictions for conspiracy to possess marijuana with the intent to distribute, in violation of 21 U.S.C. §§ 841 and 846. The government appeals the court's granting of Carlisle's motion for acquittal. We affirm the convictions of Rupert, Ramon, and Hall, and reverse Carlisle's acquittal. Our discussion of the issues

presented by Rupert, Ramon, and Hall is contained in an unpublished appendix to this decision.

I

The government argues on appeal that the district court lacked jurisdiction to acquit Carlisle.

On July 13, the jury convicted Carlisle, along with the other defendants before us, of one count of conspiracy to possess marijuana with intent to distribute. On July 23, Carlisle filed a motion for judgment of acquittal. The seven-day period in which Carlisle could move for acquittal under Fed. R. Crim. P. 29 does not include weekends, so it lapsed on July 22. The district court denied Carlisle's motion on August 24, 1994.

When Carlisle appeared for sentencing on October 14, however, the court on its own motion reversed its earlier decision and granted Carlisle's motion for acquittal.[1] The court wrote: "I do not believe that a rational trier of fact could find beyond a reasonable doubt, as the jury was instructed in Instruction 10B it must, that Carlisle knowingly and voluntarily joined the conspiracy." The

---

[1] The court noted in footnote 1 of its Opinion:
The government correctly points out that . . . defendant's motion was filed on July 23. However, I can conceive of no prejudice to the United States which will result from consideration of a motion that is one day late in this case. Because I believe that refusal to hear this motion would result in grave injustice, and because the Rule [29] permits the court to extend the deadline, I will consider this motion as if it were filed in a timely manner.

district court held that the evidence was insufficient to convict under *Jackson v. Virginia*. Following the Sixth Circuit's decision in *United States v. Burgess*, 931 F.2d 893 (6th Cir. 1991) (Table), 1991 WL 66056, and *United States v. Pearce*, 912 F.2d 159 (6th Cir. 1990), *cert. denied*, 111 S. Ct. 978 (1991), the district court found that the government failed to prove that Carlisle entered into an agreement.

Under Rule 29, it is beyond the court's jurisdiction to grant an untimely motion for acquittal. Furthermore, it is beyond a court's jurisdiction to enter a judgment of acquittal *sua sponte* after the case has been submitted to the jury. Fed. R. Crim. P. 29; *United States v. Davis*, 992 F.2d 635, 640 (6th Cir.), *cert. denied*, 114 S. Ct. 265 (1993); *see also United States v. Dennard*, 7 F.3d 235 (6th Cir. 1993) (Table), 1993 WL 351742.

In *Davis*, as here, the district court initially denied defendant's motion for acquittal. At sentencing, however, the court, as here, reversed its previous decision, asserting that it had the inherent authority to consider a judgment of acquittal after the discharge of the jury "if necessary to correct manifest injustice." *Id.* at 637. On appeal, we ruled that a district court does not have such inherent authority. *Id.* at 638. We noted that there is no provision in Rule 29 that allows a court to act on its own initiative after the case is submitted to the jury. *Id.* at 639. However, under Rule 29(c), if Carlisle had moved for acquittal within seven days of the discharge of the jury (or later, if the court so allowed during that seven-day period), it would have been within the court's jurisdiction to grant Carlisle's motion for acquittal.

The district court lacked the jurisdiction to acquit Carlisle. We therefore must reverse the judgment of acquittal.

II

In conclusion, we affirm the convictions of Ramon, Rupert, and Hall. However, we reverse Carlisle's judgment of acquittal and remand for the district court to reinstate the jury's verdict and for sentencing.

UNITED STATES DISTRICT COURT
Western District of Michigan

UNITED STATES OF AMERICA V. CHARLES ALLAN CARLISLE	**AMENDED JUDGMENT IN A CRIMINAL CASE (For Offenses Committed On or After November 1, 1987)** (Filed July 7, 1995) Case Number: 1:93 CR 66-02

James Christopherson
Defendant's Attorney

IT IS HEREBY ORDERED that pursuant to Rule 35(c) of the Federal Rules of Criminal Procedure, the judgment entered on June 27, 1995 is **VACATED.**

THE DEFENDANT was found guilty on count one after a plea of not guilty.

Accordingly, the defendant is adjudged guilty of such count(s), which involve the following offenses:

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
18:841(a)(1) 18:846 & 2	Conspiracy to possess with intent to distribute and possession with intent to distribute marijuana.	4-11-93	1

The defendant is sentenced as provided in pages 2 through 5 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

It is ordered that the defendant shall pay a special assessment of $50.00 which shall be due immediately.

IT IS FURTHER ORDERED that the defendant shall notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Date of Imposition Sentence: June 27, 1995

Defendant's Soc. Sec. No.: 374-50-0463

Defendant's Date of Birth: 6-19-48

Defendant's Address: 218 Yale, Battle Creek, MI 49017

DATED: July 7, 1995

/s/ Richard A. Enslen
Richard A. Enslan
United States District Judge

Supreme Court, U.S.
FILED
NOV 7 1995
CLERK

No. 94-9247

In The

Supreme Court of the United States

October Term, 1995

CHARLES CARLISLE,

Petitioner,

vs.

UNITED STATES,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF OF PETITIONER

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36 pp

QUESTION PRESENTED

Whether a motion for judgment of acquittal brought under Federal Rule of Criminal Procedure 29(C) that is granted by the United States District Court should be overturned because it was filed eight (8) days after the jury's verdict?

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The February 21, 1995 opinion of the court of appeals (J.A. 46-49) is reported at 48 F.3d 190. The October 27, 1993, opinion of the United States District Court for the Western District of Michigan, (J.A. 37-44) the Honorable Richard A. Enslen presiding, granting Petitioner's motion for judgment of acquittal pursuant to Federal Rule of Criminal Procedure 29(C) is not reported.

JURISDICTION

On March 15, 1995, the United States Court of Appeals for the Sixth Circuit issued a judgment. That judgment reversed the judgment of acquittal of Petitioner Charles Carlisle by the United States District Court for the Western District of Michigan. This case was remanded to the District Court for reinstatement of the jury's verdict and for sentencing. The United States Supreme Court has jurisdiction to review the judgment entered by the United States Court of Appeals for the Sixth Circuit under 28 U.S.C. § 1254(1). The United States District Court for the Western District of Michigan had jurisdiction over this criminal case pursuant to 28 U.S.C. § 1331.

STATUTORY PROVISION INVOLVED

Federal Rule of Criminal Procedure 29(C) provides:

> **Motion after Discharge of Jury.** If the jury returns a verdict of guilty or is discharged without having returned a verdict, a motion for

judgment of acquittal may be made or renewed within 7 days after the jury is discharged or within such further time as the court may fix during the 7-day period. If a verdict of guilty is returned the court may on such motion set aside the verdict and enter judgment of acquittal. If no verdict is returned the court may enter judgment of acquittal. It shall not be necessary to the making of such a motion that a similar motion has been made prior to the submission of the case to the jury.

STATEMENT OF THE CASE

On April 12, 1993, Petitioner Charles Carlisle was named in one count of a seven defendant criminal complaint charging conspiracy to possess marijuana with intent to distribute in violation of 21 U.S.C. §§ 841 and 846. J.A. 2. The evidence presented against Petitioner at trial was minimal. On the evening of April 10, 1993, co-defendants Dolores Rupert (the Petitioner's common law wife) and Amelia Ramon (Dolores Rupert's mother) arrived at the home shared by Petitioner and Dolores Rupert. J.A. 16. Dolores Rupert and Amelia Ramon drove to the home in a car. J.A. 16. They were followed by a truck driven by Thomas Crawford. J.A. 16. Thomas Crawford was the government's primary witness. J.A. 16. He was wearing a tape recording device. J.A. 16.

At trial, the government relied on a statement made by Dolores Rupert and a statement made by Petitioner in an attempt to link the Petitioner to the conspiracy to deliver marijuana. As soon as Amelia Ramon, Dolores Rupert and Thomas Crawford arrived at the home (and

without Petitioner Charles Carlisle present) Thomas Crawford recorded the following statement of Dolores Rupert: "Okay, just pull out and Chuck says to go down the street and just park for a while because he said he's heard over the scanner, there's some cops around here." J.A. 16. Prior to that statement the Petitioner's name had not been mentioned in the hours and hours of tape recorded conversations. After Thomas Crawford parked the truck he was introduced to the Petitioner for the first time. J.A. 17. Petitioner Charles Carlisle was silent throughout this meeting. J.A. 17. The Petitioner then made the following statements that the government relied on at trial:

Ramon:	We can park it behind the house.
Crawford:	All right mighty good.
Carlisle:	Figure right down the drive.
Ramon:	Yeah, because my son called, my grandson called and said there was cops around here.
Rupert:	around this area.
Ramon:	unintelligible
Rupert:	and we don't want to take a chance right now
Carlisle:	We don't want to take no chances.
Crawford:	No, un uh, that's why I was going, I, the speed limit was thirty and so I stayed right on it.
Ramon:	Yeah? Oh and before I forget, on the key, the combination. I took the thing off and I put it on there so . . .

Carlisle: Okay . . . is that for the back?

*** (one page later) ***

Ramon: We're going (unintelligible)

Crawford: Oh yeah it's best not take any . . .

Carlisle: No I won't take no chances . . .

Crawford: Okay. J.A. 17-18.

Petitioner drove Amelia Ramon to her home shortly after Dolores Rupert, Thomas Crawford and Amelia Ramon arrived with the truck of marijuana. J.A. 18 Thomas Crawford drove the truck containing marijuana over to Amelia Ramon's house. J.A. 18. The Petitioner then drove Thomas Crawford and Amelia Ramon to a hotel. J.A. 18. Thomas Crawford recorded the conversations the Petitioner made while the Petitioner drove them to the hotel. J.A. 18. The Petitioner did not make any incriminating statements during the trip. J.A. 18.

On appeal to the United States Court of Appeals for the Sixth Circuit the government relied upon only two statements. First, the government relied on the recorded hearsay statement of Dolores Rupert telling Thomas Crawford that the Petitioner wanted Thomas Crawford to "go down the street and just park for a while." Second, the government relied on the tape recording of the conversation about where the truck should be driven. The actual statements of the Petitioner which the government relied on are (1) "figure right down the drive", and (2) "I won't take no chances". In the hours and hours of tape recorded conversations there was no evidence that the Petitioner voluntarily joined the conspiracy. No where in the tape recorded conversations was there any evidence

that the Petitioner was involved in transporting the marijuana to Michigan. There was no evidence that the Petitioner had previously purchased or sold drugs. The Petitioner never discussed marijuana or mentioned drugs. There was no evidence that the Petitioner knew there were drugs in the truck. The Petitioner was not in close proximity to the drugs. There was no evidence of any agreement between the Petitioner and the other alleged co-conspirators. There simply was insufficient evidence of the Petitioner's involvement in the conspiracy.

On July 13, 1993, a jury convicted Petitioner Charles Carlisle of conspiracy to possess marijuana with intent to distribute in violation of 21 U.S.C. §§ 841 and 846. On July 23, 1993 the Petitioner, through his court appointed trial counsel, filed a motion for judgment of acquittal under Federal Rule of Criminal Procedure 29(C). J.A. 6. On August 19, 1993, the United States District Court for the Western District of Michigan denied the motion for judgment of acquittal finding that a rational trier of fact could find the Petitioner guilty. J.A. 15. The district court did not deny the Petitioner's motion for judgment of acquittal on the basis that the motion was untimely filed. The district court did not discuss in its written opinion the fact that the motion was filed eight business days after the jury's verdict.

Sentencing was scheduled for October 14, 1993. On October 14, 1993, the district court reversed its earlier opinion and granted Petitioner Charles Carlisle's motion for judgment of acquittal. J.A. 24. The district court found that the Petitioner was innocent after reviewing all the evidence.

The district court subsequently issued an eight page written opinion. The district court held as follows:

> The facts of this case require the same result as those in *Burgess* and *Pearce*. The government produced no evidence that Charles Carlisle entered into an agreement with any member of the conspiracy. Like the *Burgess* defendant, he was clearly present during the conspiracy, and the jury certainly could have found that he knew about it. However, in the course of hours of tape recorded conversations, no conspirators suggest that Carlisle is involved in this conspiracy. There was no evidence that he was involved in arranging the transport of the marijuana to Michigan. In fact, Crawford testified that prior to coming to Michigan he had never heard of Carlisle. Carlisle never handled the drugs or the truck which contained them, and there was no evidence that Carlisle was to benefit from the conspiracy. I find that Carlisle's hearsay statement concerning scanners, and the fact that he drove a conspirator (his common law mother-in-law) to her home, and then drove two conspirators to a hotel and dropped them off, is insufficient to establish that he knowingly and voluntarily joined the conspiracy.
>
> Viewing the evidence in the light most favorable to the government, I find that the government's case against Charles Carlisle is insufficient to prove beyond a reasonable doubt that Carlisle knowingly and voluntarily joined the conspiracy. As a result, the defendant's motion will be granted. J.A. 33-34.

The government filed an appeal with the United States Court of Appeals for the Sixth Circuit. The government contended that Petitioner's motion for judgment of acquittal should have been filed by July 22, 1993. It was filed on July 23, 1993. The government argued that the motion was filed one day late and, as a result, the Petitioner lost his right to have the district court decide his motion for judgment of acquittal. On February 21, 1995, the United States Court of Appeals for the Sixth Circuit issued a published Opinion, and reversed the judgment of acquittal because "under Rule 29, it is beyond the court's jurisdiction to grant an untimely motion for acquittal." J.A. 48. The Sixth Circuit recognized that the motion for judgment of acquittal was filed on July 23, 1994. The jury's verdict was July 13, 1994. The seven day period under Federal Rule of Criminal Procedure 29 does not include weekends. The seven day period lapsed on July 22, 1994, one day before the motion was filed. The Sixth Circuit relied on the case of *United States v Davis*, 992 F.2d 635 (1993), where the Sixth Circuit found that a district court does not have inherent supervisory power. The Sixth Circuit held that "if Carlisle had moved for acquittal within seven days of the discharge of the jury (or later, if the court so allowed during that seven day period), it would have been within the Court's jurisdiction to grant Carlisle's motion for acquittal." J.A. 48.

On May 12, 1995, Petitioner Charles Carlisle's Petition for Writ of Certiorari was docketed with the United States Supreme Court. The United States Supreme Court granted the Petition for Writ of Certiorari on September 27, 1995.

SUMMARY OF THE ARGUMENT

The issue which the United States Supreme Court must decide is whether a district court can deviate from the strict seven day time limitation for filing a motion for judgment of acquittal under Federal Rule of Criminal Procedure 29(C) in order to guarantee that an innocent defendant receives a fair trial. District courts should be given discretion to go beyond the strict time requirements of Federal Rule of Criminal Procedure 29(C) to ensure that innocent defendants receive fair trials. The power of the district courts to go beyond the strict time requirements of Federal Rule of Criminal Procedure 29(C) derives from two sources. First, the district courts have inherent supervisory power, in limited circumstances, to act outside the Federal Rules of Criminal Procedure. Second, the district courts have the power to grant an untimely motion for judgment of acquittal under 28 U.S.C. § 1651. The district courts should be given the power to go outside the strict time limits of Federal Rule of Criminal Procedure 29(C) when (1) there is a claim that the defendant was legally innocent, (2) the motion is filed prior to sentencing and (3) the motion was not timely filed because of a mistake made by the defendant's attorney.

The rationale behind the time limit established in Federal Rule of Criminal Procedure 29(C) is to prevent a district court from deciding a motion for judgment of acquittal after a considerable period of time has passed and the trial judge may not remember the particular facts of the trial. That rationale does not apply to the facts of this case where the motion for judgment of acquittal was filed eight (8) days after the trial. The strict seven day

time limit in Federal Rule of Criminal Procedure 29(C), as applied to the facts of this case, has resulted in the Petitioner being deprived of his liberty without due process of law as guaranteed by the Fifth Amendment to the United States Constitution.

ARGUMENT

I. THE DISTRICT COURTS HAVE INHERENT SUPERVISORY POWER TO ACT OUTSIDE THE FEDERAL RULES OF CRIMINAL PROCEDURE TO MAKE SURE THAT INNOCENT DEFENDANTS RECEIVE FAIR TRIALS.

The general supervisory power of the federal courts should include the ability to relieve an innocent defendant from the strict operation of the time limits under Federal Rule of Criminal Procedure 29(C). This Court has recognized that the federal courts "may, within limits, formulate procedural rules not specifically required by the Constitution or the Congress." *United States v Hastings*, 461 U.S. 499 (1983). The purpose underlying the supervisory power of the federal courts is to provide a remedy for a violation of a defendant's rights and to preserve judicial integrity by ensuring that a conviction is valid. It is appropriate to give the district courts the authority to go outside the strict time requirements set by Federal Rule of Criminal Procedure 29(C) to ensure that an innocent man is not found guilty. In this case the district court found that the Petitioner was an innocent man. The evidence was insufficient to convict him. Allowing the district court to go outside the strict time

requirements of Federal Rule of Criminal Procedure 29(C) will preserve the integrity of the criminal justice system.

The Federal Rules of Criminal Procedure should be flexibly applied. The motion for judgment of acquittal was filed only one day late. The district court correctly ruled it had the right to consider the motion as timely filed. Federal Rule of Criminal Procedure 2 states:

> These rules are intended to provide for the just determination of every criminal proceeding. They shall be construed to secure simplicity in procedure, fairness in administration and the elimination of unjustifiable expense and delay.

The proposition that Federal Rule of Criminal Procedure 2 gives a district court the inherent authority to enter a judgment of acquittal was set forth in *United States v Broadus*, 664 F. Supp. 592, 596-597 (D.D.C. 1987):

> Most important, Rule 2 of the Federal Rules of Criminal Procedure sets out the purposes of the criminal rules. Rule 2 mandates that a court ensure "the just determination of every criminal proceeding" if it is to conform to the Federal Rules. Fed.R.Crim.P.2. Rule 2 demands that a Court attend both to the needs of the individual litigants and to the public at large and approach procedural problems flexibly so that justice, fairness in administration, and efficiency are accommodated. *See, e.g., Fallen v. United States*, 378 U.S. 139, 142, 84 S.Ct. 1689, 1691-92, 12 L.Ed.2d 760 (1964); *Warren v United States*, 358 F.2d 527, 530 (D.C.Cir.1965); *see also* C.A. Wright, *Federal Practice and Procedure:* Criminal § 32 (1982 and Supp.1986).

> Rule 2 is the criminal procedure analogue to Fed.R.Civ.P.1, see *Advisory Committee Note to Rule 2*, which requires a court confronted with a civil case to place justice ahead of an unyielding fealty to the words of the rules. If the words of the civil rules cannot be used to defeat justice, *Cook v Boorstin*, 763 F.2d 1462, 1472 (D.C.Cir.1983); *Hormel v Helvering*, 312 U.S. 552, 557, 61 S.Ct. 719, 721-22, 85 L.Ed. 1037 (1941), a seemingly plausible inference from a criminal rule cannot command blind adherence if it would deprive an accused person, for whom the stakes are so very much higher than a civil litigant, of a just determination of his or her cause. Thus, Fed.R.Crim.P.2 implies that a trial court is *obligated* to ensure that every guilty verdict is supported by at least some evidence on every element of the crime charged.
>
> . . . .
>
> The Rules of Criminal Procedure cannot elevate form over substance to the point where considerations of efficiency are irrelevant and a trial court is deemed powerless to review a conviction that would fall upon collateral attack. A rule of law such as this, which would so wrongfully waste judicial resources, which would result in a great loss of time and money to a possibly wronged defendant, and which would fail to serve the public's interest in speedy, fair, and resource-efficient criminal justice, would be utterly at odds with the commands of Rule 2. *See, e.g., IV American Bar Association Standards for Criminal Justice* 22-2.1 (1980).

This Court has affirmed a district court's use of its supervisory powers to require a disclosure of a witness statement not required by the Federal Rules of Criminal

Procedure. *United States v Nobles*, 422 U.S. 225 (1975). This Court has recognized that the goal of the criminal justice system is make sure "that guilt shall not escape or innocence suffer," *Berger v United States*, 295 U.S. 78, 88 (1935). Innocence would suffer in this case if the district court is completely restricted by the seven day time limits of Federal Rule of Criminal Procedure 29(C). The Petitioner's court appointed trial attorney missed the deadline by one day. The Petitioner should not be made to suffer because of his attorney's mistake. The Petitioner would be left only with an appeal to the court of appeals. He would be sentenced and possibly incarcerated prior to the appeal being decided. The appeal would be decided by three judges who did not hear or see the witnesses testify at trial. The Petitioner would have the heavy burden of convincing the court of appeals that the jury's verdict was in error. The Petitioner would have to persuade the court of appeals that no "rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v Virginia*, 443 U.S. 307, 319 (1979). The Petitioner's chance of convincing the court of appeals that the evidence was insufficient to convict him is almost nonexistent without the district court's decision in his favor.

The proposition that the federal courts have supervisory powers to protect substantial rights is supported by *Gaca v United States*, 414 U.S. 618 (1973). In *Gaca*, the defendant's appeal was dismissed because of his failure to pay a $25 filing fee. The government agreed that a remand was appropriate "to reinstate the appeal in the exercise of this Court's supervisory powers in order to avoid possible injustice and the possibility of collateral

attack upon the conviction." *Id.* An innocent defendant, like the Petitioner in this case, could collaterally attack his or her conviction under 28 U.S.C. § 2255. It would be wasteful for all the parties (the federal courts, the government and the Petitioner) to require that a legally innocent person be imprisoned and forced to pursue collateral relief. The motion under 28 U.S.C. § 2255 could only be filed after sentencing because the moving party under 28 U.S.C. § 2255 must be a "prisoner in custody under sentence of a court." There are two possible results once a motion under 28 U.S.C. § 2255 is filed. The motion could be granted or denied. If the motion under 28 U.S.C. § 2255 is denied, the criminal justice system is faced with the intolerable prospect of the continued jailing of a legally innocent individual. If the motion under 28 U.S.C. § 2255 is granted, the ridiculous result is that a district court is denied the power to grant relief to an innocent person eight days after trial but the district court, after sentencing, after a hearing on a 28 U.S.C. § 2255 motion and after the innocent person is imprisoned, may then grant the appropriate relief. Under either result, it is far better for a district court to decide the motion initially under Federal Rule of Criminal Procedure 29.

It will be difficult for the Petitioner to prevail on a collateral attack of his conviction. This Court has established rules that make it more difficult for a defendant to upset a conviction by collateral, as opposed to direct, attack. In *United States v Frady*, 456 U.S. 152, 165 (1982), this Court held "an error that may justify reversal on direct appeal will not necessarily support a collateral attack on a final judgment." In *Murray v Carrier*, 477 U.S.

478, 487-488 (1986), this Court ruled that a habeas petitioner cannot avoid procedural default by asserting merely that his counsel made a significant error. This Court concluded that as "long as a defendant is represented by counsel whose performance is not constitutionally ineffective under the standard established in *Strickland v Washington*, we discern no inequity in requiring him to bear the risk of attorney error that results in a procedural default." In this case there is a clear inequity. The Petitioner could lose if he collaterally attacks his conviction because he has to "bear the risk of attorney error." The Petitioner, who has been found innocent by the district court, would be denied relief.

In *Brock v Pierce County*, 476 U.S. 253 (1986), this Court held that, despite statutory language that the Secretary of Labor shall issue a final determination of misuse of funds within 120 days after audit or receipt of a complaint of misuse, the Secretary of Labor does not lose power to recover misused funds after 120 days. This Court held:

> We would be most reluctant to conclude that every failure of an agency to observe a procedural requirement voids subsequent agency action, especially when important public rights are at stake. When, as here, there are less drastic remedies available for failure to meet a statutory deadline, courts should not assume that Congress intended the agency to lose its power to act. *Id.* at 261.

In this case, there is much more involved than merely money. The Petitioner is a decorated war veteran with no prior record. Fundamental rights are at stake. It should

not be assumed that the district court lost its power to act eight days after the jury's verdict.

In *Arizona v Manypenny*, 672 F.2d 761 (9th Cir. 1982), the defendant was a United States border patrolman. He was charged with a criminal assault on an illegal alien under Arizona law. The defendant removed the prosecution to the district court under 28 U.S.C. § 1442. The defendant's attorney made a decision not to raise the federal immunity defense at trial. The defendant was convicted. The defendant timely filed a motion for judgment of acquittal based on insufficiency of the evidence under Federal Rule of Criminal Procedure 29. The district court denied the motion. The defendant subsequently filed a motion for new trial under Federal Rule of Criminal Procedure 33 and under Federal Rule of Criminal Procedure 34 alleging that the court lacked jurisdiction because state law could not govern the acts of a federal official under the circumstances of the case. The district court treated the Federal Rule of Criminal Procedure 34 motion as a Federal Rule of Criminal Procedure 29(C) motion and granted the motion. The district court found that it had committed "fundamental error" by not granting the original motion for a new trial under Federal Rule of Criminal Procedure 29(C).

In an opinion by Justice Kennedy, the United States Court of Appeals for the Ninth Circuit held:

> We conclude that a federal district court, which has properly retained jurisdiction of a case, has the power to grant a verdict of acquittal, before or after submission of the question of a defendant's guilt to the jury, if necessary to correct a manifest error. There are limits on this authority,

cf. *United States v Smith*, 331 U.S. 469, 67 S.Ct. 1330, 91 L.Ed. 1610 (1947), and its exercise is reviewable in the Court of Appeals. To resolve this case, we need only hold that a court has power to reconsider a timely motion for judgment of acquittal premised on insufficiency of the evidence when the court, which still retains jurisdiction of the case, decides, in considering another of defendant's motions, that its earlier denial of the Rule 29 motion was erroneous. We do not address the scope of inherent power in other contexts.

In this case, Petitioner Charles Carlisle's trial counsel filed a Motion under Federal Criminal Procedure 29(C) one day late. The district court should have the power, prior to imposing sentencing, to correct a fundamental error which it has made. This power would be reviewable by the court of appeals.

Other circuits have recognized that a defendant should not be completely prejudiced when a motion for judgment of acquittal is filed only one day late. For example, in *United States v Coleman*, 811 F.2d 804, 807 (3rd Cir. 1986), the United States Court of Appeals for the Third Circuit held:

> However, the same result does not necessarily obtain for a motion of acquittal under Rule 29. In *United States v Giampa*, 758 F.2d 928, 936 n. 1 (3d Cir. 1985), this court specifically held that a district court may enter a judgment of acquittal "*sua sponte* under its inherent power," without regard to the seven-day requirement of Rule 29. *See also United States v. Wright-Barker*, 784 F.2d 161 (3d Cir. 1986) (reiterating *Giampa's* holding as to court's inherent power, but refusing to

> define limits of this power). This inherent power to enter a judgment of acquittal does not extend to judgments granting a new trial because such judgment, entered *sua sponte* by the court, might place the defendant twice in jeopardy. Even though the government may appeal an acquittal in some instances, the defendant will never face a new trial after such an appeal.
>
> Here, although the district court entered a judgment of acquittal on Del Bono's motion for acquittal, and not *sua sponte*, it would be inconsistent to hold that the court's inherent power to grant an acquittal out of time *sua sponte* does not extend to those occasions when a motion is made and granted. Accordingly, Del Bono's acquittal cannot be reversed for such a procedural deficiency, and we must now consider the merits of the appeal.

In *United States v DiBernardo*, 880 F.2d 1216, 1225, FN4 (11th Cir. 1989), the United States Court of Appeals for the Eleventh Circuit held:

> The rules of criminal procedure, of course, do not demarcate the outer limits of a trial court's authority to vacate a judgment of conviction. Under its inherent supervisory power, a district court may consider an untimely post-trial motion for judgment of acquittal or may grant such a motion sua sponte to correct manifest error when it retains jurisdiction over the case. *See United States v. Coleman*, 811 F.2d 804, 806-07 (3d Cir.1987); *Arizona v Manypenny*, 672 F.2d 761, 764-65 (9th Cir.) *cert. denied*, 459 U.S. 850, 103 S.Ct. 111, 74 L.Ed.2d 98 (1982); *United States v Doherty*, 675 F. Supp. 726, 729 (D.Mass. 1987); *United States v. Broadus*, 664 F. Supp. 592, 595-98 (D.D.C. 1987). The rules must be applied flexibly

"to provide for the just determination" of every case and must be construed "to secure simplicity in procedure, fairness in administration and the elimination of unjustifiable expense and delay." Rule 2, Fed. R.Crim.P.; *see Fallen v United States*, 378 U.S. 139, 142, 84 S.Ct. 1689, 1691, 12 L.Ed.2d 760 (1964); *United States v Mendoza*, 565 F.2d 1285, 1288-90 (5th Cir.1978). Thus, if a district court has jurisdiction over a case, then the interests of justice demand that it review the sufficiency of the evidence for conviction without regard to the technicalities of pleadings. *See Ansley v. United States*, 135 F.2d 207, 208 (5th Cir. 1943).

This Court, in interpreting Federal Rule of Criminal Procedure 29(C), should attempt to reach a result that is fair and just. It is not fair and just to completely bar the district court's review of the Petitioner's motion for judgment of acquittal because it was filed eight days after the jury's verdict. The trial judge had the facts of the trial fresh in his mind when he made the decision to grant the Petitioner's motion for judgment of acquittal. The government has not advanced any compelling reason why the district court should not have been allowed to hear the motion for judgment of acquittal filed one day late. The only reason advanced by the government is that the motion was not timely filed. The government was not prejudiced in any way by the district court's decision to consider the motion. The just and fair result is to allow district courts to exercise their inherent supervisory power to hear untimely motions under Federal Rule of Criminal Procedure 29(C) when (1) the motion is filed prior to sentencing, (2) the defendant claims he is actually

innocent and (3) the motion was not timely filed because of a mistake made by the defendant's attorney.

II. THE RATIONALE BEHIND THE TIME LIMIT ESTABLISHED IN FEDERAL RULE OF CRIMINAL PROCEDURE 29(C), TO PREVENT HAVING A TRIAL JUDGE DECIDE A MOTION FOR JUDGMENT OF ACQUITTAL AFTER A CONSIDERABLE PERIOD OF TIME HAS PASSED AND THE TRIAL JUDGE MAY NOT REMEMBER THE PARTICULAR FACTS OF THE TRIAL, DOES NOT APPLY TO THE FACTS OF THIS CASE WHERE THE MOTION FOR JUDGMENT OF ACQUITTAL WAS FILED EIGHT (8) DAYS AFTER THE TRIAL.

There are two questions which this Court should address in deciding whether to strictly enforce Federal Rule of Criminal Procedure 29(C). First, what prejudice is there to the government? On this issue, it certainly cannot be argued that there was any prejudice to the government. The motion was filed only one day late. This extra day created no prejudice to the government.

The second question this Court should address is what is the purpose behind Federal Rule of Criminal Procedure 29(C)? The purpose behind the rule, as identified in *United States v Smith*, 331 U.S. 469 (1947), is to avoid having a trial judge decide a motion after a considerable period of time has passed. After a considerable period of time has passed the trial judge may not remember the particular facts of the trial. When there is a considerable period of time (not eight days) there is a legitimate reason to not allow a district court to decide the motion and grant a new trial.

In this case the district court ruled as follows:

> Rule 29(C) allows defendants seven days after the jury is discharged, "or within such further time as the court may fix during the 7-day period," to bring a motion for judgment of acquittal. The government correctly points out that this deadline occurred on July 22 in this case, but defendant's motion was filed on July 23. However, I can conceive of no prejudice to the United States which will result from consideration of a motion that is one day late in this case. Because I believe that refusal to hear this motion would result in grave injustice, and because the Rule permits the Court to extend the deadline, I will consider this motion as if it were filed in a timely manner. (Page 1 of the District Court's October 28, 1993 Opinion found at J.A. 37.)

The purposes behind Federal Rule of Criminal Procedure 29(C) would not be served by applying the strict requirements of the rule to the facts of this case. The Petitioner's trial attorney mistakenly filed the motion for judgment of acquittal one day late. The Petitioner should not be completely prejudiced by his court appointed attorney's mistake. The district courts have available to them less drastic sanctions to enforce Federal Rule of Criminal Procedure 29, as opposed to completely denying a defendant his or her right to have a motion for judgment of acquittal decided. If the delay is the fault of defense counsel, as in this case, the district courts have the authority to appropriately sanction defense counsel. The severe penalty of refusing a defendant his or her right to have a motion for judgment of acquittal decided

should not be invoked where the motion is filed one day late.

In *United States v Smith*, the defendant was convicted of tax evasion. The defendant timely filed a motion for new trial which was denied by the trial judge. The defendant appealed to the United States Court of Appeals for the Third Circuit. The Third Circuit affirmed the conviction and held there was no error in the proceedings. A petition for certiorari was denied by the United States Supreme Court in *Memolo v United States*, 327 U.S. 800 (1946). The United States Court of Appeals for the Third Circuit then issued its mandate of affirmance and the defendant was taken into custody. On the same day that the defendant was taken into custody the trial judge entered an order vacating the judgment and granting a new trial to the defendant. The trial judge did not give any reason for granting the motion for a new trial other than that it was in the interest of justice. This Court reversed the decision of the trial judge and reinstated the conviction. This Court reasoned as follows:

> Support for the interpretation urged by respondent rises from fear of miscarriage of justice. New trials, however, may be granted for error occurring at the trial or for reasons which were not part of the court's knowledge at the time of judgment. For the latter, the Rules make adequate provision. Newly-discovered evidence may be made ground for motion for new trial within two years after judgment. Rule 33. For the former, *habeas corpus* provides a remedy for jurisdictional and constitutional errors at the trial without limit of time. Johnson v Zerbst, 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461, 146 A.L.R.

357; Walker v Johnston, 312 U.S. 275, 61 S.Ct. 574, 85 L.Ed. 830; Waley v Johnston, 316 U.S. 101, 62 S.Ct. 964, 86 L.Ed. 1302; Adams v United States ex rel. McCann, 317 U.S. 269, 63 S.Ct. 236, 87 L.Ed. 268, 143 A.L.R. 435. Possibility of unredressed injustice therefore remains only in prejudicial happenings during trial. The trial judge is given power by the Rules to entertain motions for new trial within five days after verdict and may extend that time for so long as he thinks necessary for proper consideration of the course of the trial. But extension of that time indefinitely is no insurance of justice. On the contrary, as time passes, the peculiar ability which the trial judge has to pass on the fairness of the trial is dissipated as the incidents and nuances of the trial leave his mind to give way to immediate business. It is in the interest of justice that a decision on the propriety of a trial be reached as soon after it has ended as is possible, and that decision be not deferred until the trial's story has taken on the uncertainty and dimness of things long past. 67 S.Ct. at pages 1333-1334.

This case is easily distinguished from *United States v Smith* for at least two important reasons. First, the Petitioner in this case, in the considered opinion of the district court, is guilty of no crime. The Petitioner is innocent. Second, the Petitioner's motion for judgment of acquittal was granted before sentencing, not after the appeal was decided. This Court should distinguish *United States v Smith* and hold that an untimely motion under Federal Rule of Criminal Procedure 29(C) may be heard by the district court if (1) the motion is made prior to sentencing, (2) the motion was not timely filed because of

an attorney's mistake and (3) there is a claim that the defendant is actually innocent.

In *United States v Smith*, this Court implied that Federal Rule of Criminal Procedure 33 (which allows for a motion to be made on the basis of newly discovered evidence within two years after judgment) or a habeas corpus petition would adequately protect a defendant's rights. A motion for new trial under Federal Rule of Criminal Procedure 33 would not protect the Petitioner's rights in this case because there was no newly discovered evidence. A petition for habeas corpus, filed pursuant to 28 U.S.C. § 2255, would have been premature in this case because only a "prisoner in custody under sentence of a court" may file a Motion under 28 U.S.C. § 2255. If the Petitioner filed a motion under 28 U.S.C. § 2255 after sentencing and after he was placed in custody, to obtain collateral relief the Petitioner would have to "clear a significantly higher hurdle than would exist on direct appeal." *United States v Frady*, 456 U.S. 152, 166 (1982). This Court should rule that district courts have the discretion to hear motions under Federal Rule of Criminal Procedure 29(C) prior to sentencing to protect innocent defendants.

III. THE DISTRICT COURTS HAVE THE POWER TO GRANT AN UNTIMELY MOTION FOR JUDGMENT OF ACQUITTAL UNDER 28 U.S.C. § 1651.

The district courts have the power to grant an untimely motion for judgment of acquittal under 28 U.S.C. § 1651. In *La Buy v Howes Leather Co.*, 352 U.S. 249, 259 (1957) this Court spoke of the "supervisory control of

the District Courts by the Court of Appeals" under 28 U.S.C. § 1651. 28 U.S.C. § 1651 provides:

> (a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdiction and agreeable to the usages and principles of law.
>
> (b) An alternative writ or rule nisi may be issued by a justice or judge of a court which has jurisdiction.

Under 28 U.S.C. § 1651, the district courts have the power to grant writs of *coram nobis*. In *United States v Smith*, at footnote 4, the United States Supreme Court stated as follows:

> Although this Court has reserved decision on whether the federal district courts are empowered to entertain proceedings in the nature of *coram nobis* "to bring before the court that pronounced the judgment errors in matters of fact which had not been put in issue or passed upon, and were material to the validity and regularity of the legal proceeding itself. * * * " United States v Mayer, 235 U.S. 55, 68, 35 S.Ct. 16, 19, 59 L.Ed. 129, it is difficult to conceive of a situation in a federal criminal case today where that remedy would be necessary or appropriate. Of course, the federal courts have power to investigate whether a judgment was obtained by fraud and make whatever modification is necessary, at any time. Universal Oil Products Co. v Root Refining Co., 328 U.S. 575, 66 S.Ct. 1176, 90 L.Ed. 1447. When the draftsmen of the Rules of Civil Procedure, adopted long before the Criminal Rules, wanted to give the trial judge power to grant a new trial on his own initiative, they did so in express words. Rule 59(d), Rules of Civil Procedure, 28 U.S.C.A. following section 723c.

The facts of this case justify a holding by the United States Supreme Court that the district courts should have the power to entertain proceedings in the nature of *coram nobis*. The writ of *coram nobis* should be used by the district courts in extraordinary situations to protect innocent defendants. This case represents such an extraordinary situation. The Petitioner has been found innocent by the district court. The only reason the Petitioner comes to this Court as a guilty defendant is because his trial counsel missed the deadline to file a motion for judgment of acquittal by one day. There is a judgment error in this case that is material to the validity and regularity of the legal proceeding itself.

The Federal Rules of Criminal Procedure should not be narrowly construed so as to eliminate any discretion which the district courts may have. This Court should hold that the district courts have the power through a writ of *coram nobis* to correct fundamental errors in a criminal trial, such as occurred in this case. That power, if conferred upon the district courts, is certainly not without limits. If a district court uses the power in a manner or form that is not designed to correct a fundamental error in the proceedings, such as occurred in this case, the abuse of that power by the district court can be cured on appeal. The power could be limited to situations where (1) the motion is filed prior to sentencing, (2) the defendant's claim is time barred because of counsel's mistake, and (3) a claim is made that the defendant is actually innocent.

IV. THE STRICT SEVEN DAY TIME LIMIT IN FEDERAL RULE OF CRIMINAL PROCEDURE 29(C), AS APPLIED TO THE FACTS OF THIS CASE, HAS RESULTED IN THE PETITIONER BEING DEPRIVED OF HIS LIBERTY WITHOUT DUE PROCESS OF LAW AS GUARANTEED BY THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

In *Herrera v Collins*, 113 S.Ct. 853 (1993) the defendant was convicted in state court of murder and sentenced to death. Ten years after his conviction the defendant alleged in his second federal habeas proceeding that newly discovered evidence would prove he was actually innocent of the murder. This Court described the historical background of motions for new trial:

> The Constitution itself, of course, makes no mention of new trials. New trials in criminal cases were not granted in England until the end of the 17th century. And even then, they were available only in misdemeanor cases, though the writ of error *coram nobis* was available for some errors of fact in felony cases. Orfield, New Trial in Federal Criminal Cases, 2 Vill.L.Rev. 293, 304 (1957). The First Congress provided for new trials for "reasons for which new trials have usually been granted in courts of law." Act of Sept. 24, 1789, ch. 20, § 17, 1 Stat. 83. This rule was early held to extend to criminal cases. See *Sparf and Hansen v United States*, 156 U.S. 51, 175, 15 S.Ct. 273, 321, 39 L.Ed. 343 (1895) (Gray, J., dissenting) (citing cases). One of the grounds upon which new trials were granted was newly discovered evidence. See F. Wharton, Criminal Pleading and Practice §§ 854-874, pp. 584-592 (8th ed. 1880).

The early federal cases adhere to the common-law rule that a new trial may be granted only during the term of court in which the final judgment was entered. See, e.g., *United States v Mayer*, 235 U.S. 55, 67, 35 S.Ct. 16, 18, 59 L.Ed. 129 (1914); *United States v Simmons*, 27 F.Cas. 1080, (No. 16,289) (CCEDNY 1878). Otherwise, "the court at a subsequent term has power to correct inaccuracies in mere matters of form, or clerical errors." 235 U.S., at 67, 35 S.Ct., at 19. In 1934, this Court departed from the common-law rule and adopted a time limit – 60 days after final judgment – for filing new trial motions based on newly discovered evidence. Rule II(3), Criminal Rules of Practice and Procedure, 292 U.S. 659, 662. Four years later, we amended Rule II(3) to allow such motions in capital cases "at any time" before the execution took place. 304 U.S. 592, 592 (1938) (codified at 18 U.S.C. § 688 (1940)).

There ensued a debate as to whether this Court should abolish the time limit for filing new trial motions based on newly discovered evidence to prevent a miscarriage of justice, or retain a time limit even in capital cases to promote finality. See *Orfield, supra*, at 299-304. In 1945, we set a two-year time limit for filing new trial motions based on newly discovered evidence and abolished the exception for capital cases. Rule 33, Federal Rules of Criminal Procedure, 327 U.S. 821, 855-856 ("A motion for new trial based on the ground of newly discovered evidence may be made only before or within two years after final judgment"). We have strictly construed the Rule 33 time limits. Cf. *United States v Smith*, 331 U.S. 469, 473, 67 S.Ct. 1330, 1332, 91 L.Ed. 1610 (1947). And the Rule's treatment of new trials

based on newly discovered evidence has not changed since its adoption. 113 S.Ct. at pages 864-865.

In *Herrera v Collins*, the defendant argued that the Fourteenth Amendment's guarantee of due process entitled him to a new trial if he was actually innocent. This Court held:

> In light of the historical availability of new trials, our own amendments to Rule 33, and the contemporary practice in the States, we cannot say that Texas' refusal to entertain petitioner's newly discovered evidence eight years after his conviction transgresses a principle of fundamental fairness "rooted in the traditions and conscience of our people." *Patterson v New York*, 432 U.S., at 202, 97 S.Ct., at 2322 (internal quotation marks and citations omitted). 113 S.Ct. at page 866.

The refusal of the court of appeals to allow the Petitioner's motion for judgment of acquittal filed eight days after the jury's verdict to be decided by the district court does transgress a principle of fundamental fairness rooted in the traditions and conscience of our people. The Due Process Clause of the Fifth Amendment provides that "No person shall . . . be deprived of life, liberty, or property, without due process of law. . . . " Under the facts of this case, the Petitioner has been denied due process because he has been denied the right to have the trial judge, who heard all the evidence in this case, decide prior to sentencing if the evidence was sufficient to convict him. The Due Process Clause prevents the government from engaging in conduct that "shocks the conscience," *Rochin v. California*, 342 U.S. 165, 172 (1952),

or interferes with rights "implicit in the concept of ordered liberty". *Palko v Connecticut*, 302 U.S. 319, 325-326 (1937). In determining whether Federal Rule of Criminal Procedure 29(C), under the facts of this case, violates the Due Process Clause this Court should determine "whether the rule transgresses any recognized principle of 'fundamental fairness' in operation." *Medina v California*, 112 S.Ct. 2572, 2577 (1992). Federal Rule of Criminal Procedure 29(C) does transgress recognized principles of fundamental fairness as it is applied to the facts of this case. There is no rational reason why a trial judge should not be able to decide a motion for judgment of acquittal filed eight days after the jury's verdict. The government has not even argued that it was prejudiced by the late filing. It is true that "the passage of time only diminishes the reliability of criminal adjudications." *Herrera v Collins*, 113 S.Ct. at page 862. Eight days is not such a passage of time that would cause this Court to question the reliability of the district court's decision to grant the Petitioner's motion for judgment of acquittal.

CONCLUSION

This Court should hold that an untimely motion for judgment of acquittal brought by an innocent defendant under Federal Rule of Criminal Procedure 29(C) that is filed prior to sentencing can, in the discretion of the district court, be heard and decided to reach a fair and just result. In the alternative, this Court should hold that an untimely motion for judgment of acquittal brought under Federal Rule of Criminal Procedure 29(C) may be heard by the district court to correct a fundamental error

in the proceeding. This Court should rule that the federal trial courts have the inherent supervisory power to go outside the strict time limits established in Federal Rule of Criminal Procedure 29(C) only when (1) there is a claim that the defendant was legally innocent, (2) the motion is filed prior to sentencing and (3) the time limit was not met because of a mistake made by the defendant's attorney. The district court's power to entertain the untimely motion comes from the inherent supervisory power of the district courts. The district court's power to decide the untimely motion also comes from the district court's ability to hear a writ of *coram nobis*. If this Court holds that the district court did not have the authority to decide the motion that was filed one day late, this Court should hold that Federal Rule of Criminal Procedure 29(C), as applied to the facts of this case, violates the Fifth Amendment to the United States Constitution. For the reasons set forth above, the Supreme Court of the United States should reverse the Judgment and Opinion of the Sixth Circuit Court of Appeals dated February 21, 1995, and reinstate the Opinion and Judgment of the United States District Court for the Western District of Michigan dated October 28, 1993.

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No. 94-9247

In the Supreme Court of the United States

OCTOBER TERM, 1995

CHARLES CARLISLE, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether a district court has authority to grant a post-verdict motion for judgment of acquittal filed outside the time limits prescribed by Federal Rule of Criminal Procedure 29(c).

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In the Supreme Court of the United States

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No. 94-9247

CHARLES CARLISLE, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (J.A. 46-49) is reported at 48 F.3d 190. The opinions of the district court first denying (J.A. 15-22) and later granting (J.A. 37-44) petitioner's motion for judgment of acquittal are not reported.

JURISDICTION

The judgment of the court of appeals was entered on February 21, 1995. The petition for a writ of certiorari was filed on May 12, 1995, and was granted on September 27, 1995 (116 S. Ct. 40). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

RULE INVOLVED

Federal Rule of Criminal Procedure 29 provides:

Motion for Judgment of Acquittal

(a) Motion Before Submission to Jury. Motions for directed verdict are abolished and motions for judgment of acquittal shall be used in their place. The court on motion of a defendant or of its own motion shall order the entry of judgment of acquittal of one or more offenses charged in the indictment or information after the evidence on either side is closed if the evidence is insufficient to sustain a conviction of such offense or offenses. If a defendant's motion for judgment of acquittal at the close of the evidence offered by the government is not granted, the defendant may offer evidence without having reserved the right.

(b) Reservation of Decision on Motion. The court may reserve decision on a motion for judgment of acquittal, proceed with the trial (where the motion is made before the close of all the evidence), submit the case to the jury and decide the motion either before the jury returns a verdict or after it returns a verdict of guilty or is discharged without having returned a verdict. If the court reserves decision, it must decide the motion on the basis of the evidence at the time the ruling was reserved.

(c) Motion After Discharge of Jury. If the jury returns a verdict of guilty or is discharged without having returned a verdict, a motion for judgment of acquittal may be made or renewed within 7 days after the jury is discharged or within such further time as the court may fix during the 7-day period. If a verdict of guilty is returned the court may on such motion

set aside the verdict and enter judgment of acquittal. If no verdict is returned the court may enter judgment of acquittal. It shall not be necessary to the making of such a motion that a similar motion has been made prior to the submission of the case to the jury.

(d) Same: Conditional Ruling on Grant of Motion. If a motion for judgment of acquittal after verdict of guilty under this Rule is granted, the court shall also determine whether any motion for a new trial should be granted if the judgment of acquittal is thereafter vacated or reversed, specifying the grounds for such determination. If the motion for a new trial is granted conditionally, the order thereon does not affect the finality of the judgment. If the motion for a new trial has been granted conditionally and the judgment is reversed on appeal, the new trial shall proceed unless the appellate court has otherwise ordered. If such motion has been denied conditionally, the appellee on appeal may assert error in that denial, and if the judgment is reversed on appeal, subsequent proceedings shall be in accordance with the order of the appellate court.

The texts of Federal Rules of Criminal Procedure 2, 33, 45, and 57, and the text of the All Writs Act, 28 U.S.C. 1651, are reprinted at App., *infra*, 1a-5a.

STATEMENT

Following a jury trial, petitioner was convicted in the United States District Court for the Western District of Michigan of conspiring to possess marijuana with the intent to distribute it, in violation of 21 U.S.C. 846. He filed a post-verdict motion for judgment of acquittal outside the time limit prescribed by Federal Rule of Criminal Procedure 29(c), which the

district court denied, J.A. 23, but later reconsidered and granted, J.A. 45. The court of appeals reversed and remanded for reinstatement of the verdict and for sentencing, on the grounds that the district court had lacked authority to consider an untimely motion for a judgment of acquittal. J.A. 46-49.

1. Petitioner's jury trial began on June 30, 1993. The evidence at trial, with respect to petitioner's participation in the conspiracy, showed that, on April 10, 1993, petitioner, Dolores Rupert (petitioner's common-law wife), Amelia Ramon (Rupert's mother), and Thomas Crawford arrived at the home that petitioner shared with Rupert. Ramon and Rupert arrived by car, and Crawford, who was working as a police informant and wearing a concealed tape recorder, followed them there in a truck containing approximately 270 pounds of marijuana. Petitioner was present at the home. Rupert instructed Crawford where to park the truck, stating: "Okay, just pull out and [petitioner] says to go down the street and just park for awhile because he said he's heard over the scanner, there's some cops around here." Crawford complied with petitioner's suggestion. J.A. 16-18; Gov't C.A. Br. 3-4. Crawford then returned to the house and was introduced to petitioner. Crawford, petitioner, Rupert, and Ramon discussed where to park the truck for the evening in light of petitioner's expressed concern that police were in the area, and how to secure the truck.[1] Petitioner agreed that the truck should be parked behind Ramon's house, "right down the drive." He explained to the others that

[1] Petitioner's counsel had conceded in his opening statement that petitioner knew at the time of the offense that the truck contained marijuana. J.A. 16.

"[w]e don't want to take no chances," and that "I won't take no chances." Petitioner also inquired of the others whether a key held by Ramon unlocked a padlock on the back of the truck, and he was informed that it did. Petitioner and Ramon then drove to Ramon's house, with Crawford following in the truck bearing the marijuana. After Crawford parked the truck behind Ramon's house as suggested by petitioner, petitioner drove Ramon and Crawford to a hotel. J.A. 17-18.

Petitioner did not move during the trial for a judgment of acquittal under Federal Rule of Criminal Procedure 29(a). On July 13, 1993, the jury returned a verdict of guilty, and the court discharged it that same day. On July 23, 1993, petitioner filed a post-verdict motion for judgment of acquittal. That motion was untimely, because it was filed one day after the expiration of the seven-day period following the discharge of the jury that Rule 29(c) allows for such motions.[2] Petitioner's motion contended that, although the evidence had been sufficient to establish the existence of a conspiracy to possess and distribute marijuana, it had not been sufficient to establish that he had knowingly participated in that conspiracy. J.A. 15. The government responded that, because petitioner's motion had been filed outside the time limit prescribed by Rule 29(c), the court lacked jurisdiction

[2] Rule 29(c) provides that "a motion for judgment of acquittal may be made or renewed within 7 days after the jury is discharged or within such further time as the court may fix during the 7-day period." Federal Rule of Criminal Procedure 45(a) provides that "Saturdays, Sundays and legal holidays shall be excluded" from the seven-day period. Excluding the weekend of July 17-18, 1993, the seven-day period expired on July 22, 1993.

to consider it, and, alternatively, that the evidence had been sufficient. Gov't C.A. Br. 1.

In an opinion issued on August 24, 1993, the district court did not address the timeliness of petitioner's motion, but denied that motion on the ground that the evidence had been sufficient for "a rational trier of fact [to] find beyond a reasonable doubt that [petitioner] knew about the conspiracy, and that [petitioner] knowingly and voluntarily joined the conspiracy." J.A. 18. The court explained that

> [petitioner] was more than just present during the conspiracy. He took actions to help hide the contraband from the police. He stated his intention to not "take chances." He inquired whether a key unlocked the back of the truck which contained the marijuana. And finally, * * * [petitioner's] use of the word "we" in a statement made to other conspirators during a conversation about where to put the truck full of marijuana to avoid the place [*sic*], "we don't want to take no chances," could indicate joinder with the conspiracy to a rational trier of fact. I find that [petitioner's] hearsay statement concerning the scanners, his statements evincing a desire to avoid the police, and the fact that he drove a conspirator (his common law mother-in-law) to her home, and then drove two conspirators to a hotel and dropped them off, is sufficient for a rational trier of fact to find that he knowingly and voluntarily joined the conspiracy.

J.A. 21.

2. On October 14, 1993, petitioner appeared for sentencing. Before that time, the district court had been provided with a presentence investigation report

(PSR). That report calculated petitioner's sentencing range under the Sentencing Guidelines to be 63-78 months' imprisonment and noted that, because of the amount of marijuana involved in the offense, petitioner faced a mandatory minimum sentence of five years' imprisonment under 21 U.S.C. 841(b)(1)(B). The PSR also recounted petitioner's military service in Vietnam. J.A. 35.

At the sentencing hearing, the district court announced that it was reversing its prior ruling on the sufficiency of the evidence and that it was now granting petitioner a judgment of acquittal on the ground that the evidence was insufficient to establish that petitioner had joined the conspiracy. J.A. 29-34.[3]

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[3] The court's written opinion explaining that decision summarized the evidence in the same manner as its earlier written opinion, compare J.A. 16-18 with J.A. 38-40, and the court reiterated its conclusion that the evidence had been sufficient to establish petitioner's knowledge of the marijuana-distribution conspiracy. J.A. 41. But, the court now concluded, the evidence had not established that petitioner had joined that conspiracy (J.A. 43-44):

> The government produced no evidence that [petitioner] entered into an agreement with any member of the conspiracy. * * * [H]e was clearly present during the conspiracy, and the jury could have found that he knew about it. However, in the course of hours of tape recorded conversations, no conspirators suggest that [petitioner] is involved in the conspiracy. There was no evidence that he was involved in arranging the transport of the marijuana to Michigan. In fact, Crawford testified that prior to coming to Michigan, he had not heard of [petitioner]. [Petitioner] never handled the drugs or the truck which contained them, and there was no evidence that [petitioner] was to benefit from the conspiracy. I find that [petitioner's] hearsay statement concerning the scanners, and the fact that he drove a conspirator (his common law mother-in-

After discussing its new ruling, the court noted that it had learned "for the first time when I read the presentence report that [petitioner] served his country in Vietnam in 1967 or 1968, and that while he was there he received the Bronze Star." J.A. 35. The court added that "[t]he Court doesn't meet too many Bronze Star recipients." *Ibid.* Addressing petitioner, the court concluded the hearing by saying, "on behalf of my country I thank you for your service in Vietnam. This is the end of this proceeding." J.A. 35-36.

The court later filed an opinion and judgment in support of its oral ruling. J.A. 37-45. The court acknowledged that petitioner had filed his motion for a judgment of acquittal outside of the seven-day filing deadline prescribed by Rule 29(c). The court stated, however, that

> I can conceive of no prejudice to the United States which will result from consideration of a motion that is one day late in this case. Because I believe that refusal to hear this motion would result in grave injustice, and because the Rule permits the Court to extend the deadline, I will consider this motion as if it were filed in a timely manner.

J.A. 37 n.1.

3. The court of appeals reversed. J.A. 46-49. The court noted that, under its decision in *United States* v. *Davis*, 992 F.2d 635 (6th Cir.), cert. denied, 114 S. Ct. 265 (1993), a district court lacks jurisdiction to grant a motion for judgment of acquittal filed outside

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law) to her home, and then drove two conspirators to a hotel and dropped them off, is insufficient to establish that he knowingly and voluntarily joined the conspiracy.

the time limit set by Rule 29(c). J.A. 48. In *Davis*, the court noted that Rule 29(c) requires a defendant to make a post-verdict motion for judgment of acquittal within seven days after the discharge of the jury, and that Federal Rule of Criminal Procedure 45(b) prohibits the court from retroactively extending that period. 992 F.2d at 639-640; see Fed. R. Crim. P. 45(b) (district court "may not extend the time for taking any action under Rules 29, 33, 34 and 35, except to the extent and under the conditions stated in them"). *Davis* also held that Rule 29(c) implicitly forbids a district court from *sua sponte* entering a judgment of acquittal after a verdict. It reasoned that, while Rule 29(a) expressly authorizes a district court to enter a judgment of acquittal on its own motion before a case is submitted to the jury, "there is no provision authorizing the court to act on its own initiative after the case is submitted to the jury." 992 F.2d at 639; see also J.A. 48.

Although both the government and petitioner had briefed the issue whether the evidence was sufficient, Gov't C.A. Br. 9-11; Pet. C.A. Br. 9-15, the court of appeals did not address that issue. Instead, it remanded for reinstatement of the verdict and for resentencing. J.A. 49.[4]

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[4] On June 27, 1995, while the petition for certiorari was pending, the district court convened a sentencing proceeding and sentenced petitioner, *inter alia*, to six months' imprisonment. J.A. 50-51. The court departed downward based on petitioner's military service in Vietnam and on the "aberrant" nature of petitioner's conduct in this case. 6/27/95 Sent. Tr. 14-19. The court also held that the requirements under 18 U.S.C. 3553(f) for imposing a sentence below the mandatory minimum sentence of five years' imprisonment, see 21 U.S.C. 841(b)(1)(B), had been met. At the time it imposed sentence,

SUMMARY OF ARGUMENT

The question presented in this case is whether a district court has authority to grant a defendant's post-verdict motion for judgment of acquittal filed outside the seven-day time limit prescribed by Federal Rule of Criminal Procedure 29(c). The text of the Federal Rules of Criminal Procedure answers that question. Rule 29(c) provides that "a motion for judgment of acquittal may be made or renewed within 7 days after the jury is discharged or within such further time as the court may fix during the 7-day period." Rule 45(b) makes the seven-day time limit in Rule 29(c) mandatory. It states that a district court "may not extend the time for taking any action under Rule[] 29 * * *, except to the extent and under the conditions stated in [that Rule]." Those Rules, read in tandem, preclude a district court from entertaining a motion for a judgment of acquittal more than seven days after the discharge of the jury, absent prior, timely invocation of its authority.

The mandatory character of the seven-day time limit of Rule 29(c) is reinforced by this Court's decisions in *United States* v. *Smith*, 331 U.S. 469 (1947), and *United States* v. *Robinson*, 361 U.S. 220 (1960). In *Smith*, the Court construed parallel language in Federal Rule of Criminal Procedure 33 imposing a five-day time limit upon motions for a new trial. It held that Rule 33 prescribes "precise times" (331 U.S. at 473 n.2) within which the judicial power to order a new trial is confined, whether that action is

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the district court also dismissed as premature a motion pursuant to 28 U.S.C. 2255 to vacate and set aside judgment that petitioner had filed on June 2, 1995. *United States* v. *Carlisle*, No. 1:93:CR:66-02 (W.D. Mich. June 27, 1995).

taken in response to a defendant's motion or *sua sponte*. In *Robinson*, the Court held that, because the period for taking an appeal was identified in Rule 45(b) as a period that a district court could not extend, the ten-day time period for filing a notice of appeal set by the Federal Rules was mandatory and jurisdictional. Under *Robinson*, the seven-day time limit set by Rule 29(c) is similarly binding, because Rule 29 is listed in Rule 45(b) as a Rule whose time limit may not be extended except as provided in Rule 29(c) itself.

No provision of the Federal Rules of Criminal Procedure overrides Rule 29(c)'s framework governing motions for acquittal. Nor does the power to issue a writ of coram nobis authorize action outside of the time limits of Rule 29. Coram nobis is available when facts that would render a trial court's decision irregular and invalid were not brought to the court's attention, and where no alternative remedies are available. An untimely claim of evidentiary insufficiency, which could not be heard consistent with the structure of the Rules, does not meet the requirements for that extraordinary writ. The district court likewise may not use its "supervisory power" to grant an untimely Rule 29(c) motion. "Supervisory power" cannot be used when it would circumvent or conflict with the precise requirements of the Federal Rules of Criminal Procedure.

Petitioner's reliance on policy concerns to avoid enforcement of Rule 29(c)'s time limit is misplaced. If the Rule as presently drafted is deemed to work unfair or harsh results, the drafters remain free to amend it. In any event, petitioner's concerns are misguided. The time limit serves valid interests in the criminal justice system, including the prompt resolution of proceedings in the trial courts and

sparing those courts the need to decide whether particular delinquent filings were or were not justified. And the enforcement of the Rule's time limit does not foreclose review of claims of evidentiary insufficiency. It permits review of a defendant's claim in the court of appeals under a plain error standard, and leaves open collateral review when a defendant can meet the requirements for such relief.

ARGUMENT

A DISTRICT COURT LACKS AUTHORITY TO GRANT A POST-VERDICT MOTION FOR A JUDGMENT OF ACQUITTAL FILED OUTSIDE THE TIME LIMITS PRESCRIBED BY FEDERAL RULE OF CRIMINAL PROCEDURE 29(c)

Federal Rule of Criminal Procedure 29 comprehensively sets out the time limits for the making of a motion for a judgment of acquittal. Subsection (a) allows the court to enter a judgment of acquittal during the trial, "on motion of a defendant or of its own motion," at the close of the evidence offered by either side. After the jury has been discharged, the court's power to act on a motion for judgment of acquittal is defined by subsections (b) and (c). Subsection (b) allows a court to act on a motion for judgment of acquittal after the jury has been discharged if the court has reserved decision on a prior motion for judgment of acquittal. Subsection (c) permits a court to entertain such a motion when it is made or renewed within seven days after the discharge of the jury, or where the court, during that seven-day period, has extended the deadline for making such a motion.

Once seven days have expired after the jury's discharge, the structure of Rule 29 forbids a district court from entertaining a motion for judgment of acquittal, unless the court has either reserved decision on a prior, timely motion or has extended the time for making such a motion within seven days after the verdict. That Rule fosters certainty, clarity, and efficiency in the resolution of criminal proceedings in the trial court, while leaving a defendant who has not made a timely post-verdict motion for judgment of acquittal free to raise a claim of evidentiary insufficiency on appeal or, in some circumstances, on collateral review. Because petitioner did not submit a timely motion for judgment of acquittal in the district court in this case, the court of appeals correctly determined that the district court lacked jurisdiction to entertain it.[5]

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[5] That holding is consistent with the approach taken in *United States* v. *Stevens*, 978 F.2d 565, 569 (10th Cir. 1992); *United States* v. *Hocking*, 841 F.2d 735, 736-737 (7th Cir. 1988); *United States* v. *Fagan*, 821 F.2d 1002, 1011-1012 & n.7 (5th Cir. 1987), cert. denied, 484 U.S. 1005 (1988); *United States* v. *Godoy*, 678 F.2d 84, 88 (9th Cir. 1982), cert. denied, 464 U.S. 959 (1983); and *United States* v. *Johnson*, 487 F.2d 1318, 1321 (5th Cir.), cert. denied, 419 U.S. 825 (1974). But see *United States* v. *Coleman*, 811 F.2d 804, 806-807 (3d Cir. 1987); *United States* v. *Giampa*, 758 F.2d 928, 934-935, 936 n.1 (3d Cir. 1985); and *Arizona* v. *Manypenny*, 672 F.2d 761, 766 (9th Cir.), cert. denied, 459 U.S. 850 (1982) (all suggesting, in factually distinguishable contexts, the existence of some inherent power to consider an untimely motion); see also *United States* v. *DiBernardo*, 880 F.2d 1216, 1225 n.4 (11th Cir. 1989) (dicta in case involving Rule 33).

A. Rule 29(c) And Rule 45(b) And This Court's Decisions Establish That A District Court Lacks The Authority To Grant An Untimely Motion For Judgment Of Acquittal

1. When interpreting a statute or a Federal Rule, this Court looks "first and foremost to its text." *United States* v. *Alvarez-Sanchez*, 114 S. Ct. 1599, 1603 (1994); see *Libretti* v. *United States*, 116 S. Ct. 356, 362 (1995). The texts of Rule 29 and Rule 45(b), read together, make clear that a district court lacks jurisdiction to consider a defendant's motion for judgment of acquittal made more than seven days after the discharge of the jury, except where the court has extended that deadline before the seven-day period has expired. Rule 29(c) provides that a defendant's motion for judgment of acquittal "may be made or renewed within 7 days after the jury is discharged or within such further time as the court may fix during the 7-day period." Rule 45(b), which governs the enlargement of time limits under the Federal Rules of Criminal Procedure, provides that the district court "may not extend the time for taking any action under Rules 29, 33, 34 and 35, except to the extent and under the conditions stated in them." Thus, a district court may not retroactively extend the seven-day deadline prescribed by Rule 29(c) in order to convert an out-of-time motion into a timely one under the Rule.

Nor may the district court treat the defendant's untimely motion as one made by the court, and address it on that basis. The text of Rule 29 leaves no room for a district court to act on its own initiative to enter a judgment of acquittal more than seven days after the discharge of the jury, in the absence of the

prior reservation of such a motion or the extension of the time for it to be made. Rule 29(a), which applies to a motion made *before* submission of the case to the jury, refers explicitly to the court's power to act "of its own motion" to enter a judgment of acquittal. Rule 29(c), which governs the period *after* the discharge of the jury, does not refer to action initiated by the court. It does, however, describe procedures that govern any "motion for a judgment of acquittal." The most reasonable construction of the Rule is thus that it includes action by the court, as well as the defendant, to make or renew a motion for a judgment of acquittal after the return of the jury's verdict. Under that construction, the court's power to act of its own motion after the verdict is necessarily limited to the seven-day period established by Rule 29(c). A court may therefore enter a judgment of acquittal, or extend the time for consideration of that action, within seven days of the discharge of the jury. The court retains no power to act for an indefinite time thereafter.[6]

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[6] It is possible, in the alternative, to read the term "motion" in Rule 29(c) to refer only to a motion by the defendant. Under that reading, Rule 29(c)'s omission of any reference to the court's own motion, juxtaposed against Rule 29(a)'s express authorization of the court's own motion, implies that after the discharge of the jury the court lacks any power to enter a judgment of acquittal on its own initiative (except when, pursuant to Rule 29(b), the court had reserved ruling on its own pre-verdict motion). See *United States* v. *Davis*, 992 F.2d 635, 639 (6th Cir.) (adopting that interpretation), cert. denied, 114 S. Ct. 265 (1993). Under that reading of Rule 29(c), absent a reserved motion at trial, a district court may never act "of its own motion" to acquit a defendant after the discharge of the jury.

2. This Court's decisions in *United States* v. *Smith*, 331 U.S. 469 (1947), and *United States* v. *Robinson*, 361 U.S. 220 (1960), strongly support the conclusion that a district court lacks jurisdiction to grant a post-verdict motion for judgment of acquittal filed outside the time limits prescribed by Rule 29(c). In *Smith*, this Court held that a district court lacks power to order a new trial outside the time limit set by Federal Rule of Criminal Procedure 33. That Rule provided—in language paralleling that of Rule 29(c)—that a motion for a new trial based on grounds other than newly discovered evidence "shall be made within 5 days after verdict or finding of guilty or within such further time as the court may fix during the 5-day period." 331 U.S. at 472.[7] The defendant in *Smith* had moved for a new trial, but that motion had been denied, and the conviction had been upheld on appeal. Following affirmance of the defendant's conviction on appeal, however, the district court *sua sponte* issued an order granting a new trial. The court of appeals denied the government's petition for writs of mandamus and prohibition to vacate the new trial order. *Id.* at 470-471.

This Court reversed, rejecting the defendant's argument that, "because the literal language of the Rule places the five-day limit only on the making of the motion, it does not limit the power of the court later to grant the motion." 331 U.S. at 473. At

[7] Rule 33 was amended in 1966 to increase to seven days the time period within which a motion for a new trial based on grounds other than newly discovered evidence shall be made. See Fed. R. Crim. P. 33 ("A motion for a new trial based on any other grounds shall be made within 7 days after verdict or finding of guilty or within such further time as the court may fix during the 7-day period.").

common law, the Court noted, a court's power over its judgments expired with the "term of court." While an earlier rule of procedure had given a defendant three days within which to move for a new trial, and while the Federal Rules had extended that time to five days (Rule 33) and concomitantly repealed the term-of-court limitation (Rule 45(c)), the Federal Rules had not expanded the power of the trial court "to grant new trials on its own motion * * * indefinitely." *Id.* at 473-474. Rather, the Court held, the Federal Rules prescribe "precise times" and "constant time periods" within which the judicial power to order a new trial must be "confine[d]." *Id.* at 473 n.2.[8]

The Court in *Smith* also observed that policy considerations militate against holding "that the court has a continuing power on [its] own initiative to grant what the defendant has not the right to go into open court and ask." 331 U.S. at 475. First, a rule "which deprived a judge of power to do what was asked when request was made by the person most concerned, and yet allowed him to act without petition," would raise serious constitutional issues, which counseled against such an interpretation. *Id.* at 474. Furthermore, the Court observed,

> [t]o approve the practice followed in this case would almost certainly subject trial judges to private appeals or application by counsel or friends of one convicted. *We think that expiration of the time within which relief can openly be asked of*

[8] See 3 Charles Alan Wright, *Federal Practice and Procedure (Criminal)* § 558, at 360 (2d ed. 1982) ("The time limitations of Rule 33 are jurisdictional."); *id.* at 361 n.1 (collecting cases); cf. *Herrera* v. *Collins*, 113 S. Ct. 853, 865 (1993) ("We have strictly construed the Rule 33 time limits.").

> *the judge, terminates the time within which it can properly be granted on the court's own initiative.* If the judge needs time for reflection as to the propriety of a new trial, he is at liberty to take it before denying a timely made motion therefor.

Id. at 475 (emphasis added).[9]

In *Robinson*, the Court held that the time limit within which a defendant may file a notice of appeal may not be extended beyond the ten-day period following entry of judgment set by Federal Rule of Criminal Procedure 37(a)(2). The lower courts in *Robinson* had held that, because the defendants' failure to file notices of appeal until 11 days after that deadline resulted from "excusable neglect," the notices of appeal would be deemed valid. This Court reversed, relying on Rule 45(b). Rule 45(b), the Court

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[9] The Court in *Smith* noted a third policy consideration supporting its reading of Rule 33: the interest in ensuring that appellate courts review only those district court decisions that are final. If a district court were empowered, after an appeal, to "set aside all that was the basis of appeal," as had occurred in *Smith* itself, the Court noted that finality would not be assured. 331 U.S. at 474; see *ibid.* ("It is not the function of appellate courts to review tentative decisions of trial courts"). Noting that third policy justification, petitioner argues (Br. 22) that *Smith* bars only those new trial orders made "after the appeal [has been] decided." *Smith*, however, held more broadly that a district court's power to order a new trial in cases not involving newly discovered evidence "terminates" not upon the onset of appellate review, but upon the expiration of the period within which a defendant could move for such relief under Rule 33. See 331 U.S. at 475. See also *Robinson*, 361 U.S. at 225-226 (under *Smith*, "the power of the District Court *sua sponte* to grant a new trial under Rule 33 is limited to the time fixed in that Rule").

noted, provided that certain actions could be done out of time where the "failure to act was the result of excusable neglect." The Court emphasized, however, that Rule 45(b) identified specific circumstances in which district courts could not allow acts to be done out of time:

> [T]he court may not enlarge the period for taking any action under Rules 33, 34 and 35, except as otherwise provided in those rules, *or the period for taking an appeal.*

361 U.S. at 223 (quoting Fed. R. Crim. P. 45(b)) (emphasis added). Because recognizing a late notice of appeal "'enlarge[s]' the period for taking an appeal," the Court held, it was forbidden by Rule 45(b). *Id.* at 224. Thus, "the 10-day period prescribed by Rule 37(a)(2) is mandatory and jurisdictional." *Ibid.*[10]

The Court in *Robinson* observed that to recognize an untimely notice of appeal would be inconsistent with *Smith*, because *Smith* also involved a Rule with a time limit covered by Rule 45(b)'s express bar against enlargement. 361 U.S. at 225-226. If an untimely notice of appeal were held to confer jurisdiction of the appeal based on "excusable neglect," it would follow that a finding of excusable neglect would permit delayed action under the other Rules listed in Rule 45(b)—Rules 33, 34, and 35. That result would contravene *Smith*'s holding that Rule 33 "prescribed

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[10] Rule 37 was abrogated effective July 1, 1968, and the ten-day deadline for filing a notice of appeal in criminal cases is today mandated by Federal Rule of Appellate Procedure 4(b). Relying on *Robinson*, this Court has held that the time limits set by Rule 4 are "mandatory and jurisdictional." *Browder* v. *Director, Dep't of Corrections*, 434 U.S. 257, 264 (1978) (quoting *Robinson*, 361 U.S. at 229).

precise times within which the power of the courts must be confined," whether that power is wielded *sua sponte* or in response to a defense motion. *Robinson*, 361 U.S. at 225-226.

As the Sixth Circuit has noted, the "decisions in *Smith* and *Robinson* leave little doubt concerning the proper resolution of the question" of whether a district court has authority to grant an untimely motion for judgment of acquittal. *United States* v. *Davis*, 992 F.2d 635, 639 (6th Cir.), cert. denied, 114 S. Ct. 265 (1993). When *Smith* and *Robinson* were decided, Rule 29 was not listed in Rule 45(b). In 1966, however, when Rule 29(c) was promulgated, Rule 45(b) was amended to add Rule 29 to the list of Rules with regard to which courts could not extend the time limit except as provided in those Rules. See Fed. R. Crim. P. 45 advisory committee's note (1966 amendment). Under *Robinson*, Rule 45(b)'s inclusion of Rule 29 means a district court cannot grant a defendant's untimely motion for judgment of acquittal, because the seven-day time limit in Rule 29, like the time limit at issue in *Robinson*, is "mandatory and jurisdictional." 361 U.S. at 224. Permitting delayed action under Rule 29 would also conflict with *Smith*'s holding that the parallel wording in Rule 33 "prescribed precise times within which the power of the courts must be confined." *Id.* at 226.

3. The history of Rule 29 and Rule 45 confirms that textual understanding. In 1940, Congress authorized this Court to promulgate Rules of Criminal Procedure that would become effective upon "passive acceptance" by Congress; this Court did so with the aid of an Advisory Committee. *Robinson*, 361 U.S. at 227. The Advisory Committee's preliminary draft of Rule 29, issued in May 1943,

contained two sections: Section (a) allowed motions for acquittal to be granted "at any time after the evidence on either side is closed"; Section (b) provided that, if the court denied such a motion, the defendant could "renew[]" that motion "within 10 days after the jury is discharged."[11] Based on suggestions from the bench and bar, later versions of the Rule (including the final version) made the time limits under the Rule more stringent. In Section (a), the words "at any time" were deleted, making clear that the court was required either to reserve the motion or to act on it before submitting the case to the jury. In Section (b), the ten-day time period was shortened to match the five-day period then allowed for motions for new trial under Rule 33.[12] The Advisory Committee's decision to strike the language allowing a motion for judgment of acquittal to be made "at any time" and to fix instead a five-day time limit following discharge of the jury is persuasive evidence that the Committee expected the time limit it set for post-verdict motions to be mandatory, not precatory. The 1966 amendment that increased the time limits under Rule 29(c) and Rule 33 to the current limit of seven days, see Fed. R. Crim. P. 29 advisory committee's note (1966 amendment), is also indicative of a studied selection of a definite time period. That deliberate approach is inconsistent with petitioner's view that Rule 29(c)'s time limit is meant to be "flexibly applied" (Br. 10).

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[11] See Preliminary Draft of Fed. R. Crim. P. 27 (May 1943), *reprinted in* 1 *Drafting History of the Federal Rules of Criminal Procedure* 125 (Madeline J. Wilken and Nicholas Triffin eds., 1991) [hereinafter *Drafting History*]. Early drafts of the Rule were numbered differently from the final Rule.

[12] See Second Preliminary Draft of Fed. R. Crim. P. 31 (Feb. 1944), *reprinted in* 4 *Drafting History* 121.

The history of Rule 45 points to the same conclusion. At common law, a court's authority over its judgments expired with the term of court. See *Smith*, 331 U.S. at 473; *United States* v. *Mayer*, 235 U.S. 55, 67 (1914).[13] Rule 45 reflected a decision to "abolish[] the expiration of a term of court as a time limitation for the taking of any step in a criminal proceeding" and to substitute "specific time limitations" in its place. See Fed. R. Crim. P. 45 advisory committee's note (1944 adoption). The purpose of establishing fixed time limits was to avoid the uncertainty inherent in the term-of-court concept. See *ibid.*; *United States* v. *Keane*, 852 F.2d 199, 202 (7th Cir. 1988) (because "term-of-court" often referred to the "period that lasted until the judges moved on to some other city," the term limitation produced "erratic results," depending on how late in the term the judgment had been rendered), cert. denied, 492 U.S. 928 (1989). As this Court has explained:

> The Rules, in abolishing the term rule, did not substitute indefiniteness. On the contrary, precise times, independent of the term, were prescribed. *The policy of the Rules was not to extend power indefinitely but to confine it within constant time periods.* See Notes to Rules of Criminal Procedure, Rule 45.

Smith, 331 U.S. at 473 n.2 (emphasis added).

In 1966, Rule 29 was added to the Rules listed in Rule 45(b), and the history of that amendment reflects a recognition that *Smith* and *Robinson* would render

[13] In *Mayer*, the Court recognized, as an exception to that rule, that a court possessed power in a subsequent term "to correct inaccuracies in mere matters of form, or clerical errors." 235 U.S. at 67. That exception is inapplicable here.

the seven-day time limit in Rule 29(c) mandatory. The Advisory Committee's Note to Rule 29(c) states that the power to extend the seven-day time limit in that Rule is patterned on Rule 33, the Rule at issue in *Smith*. See Fed. R. Crim. P. 29 advisory committee's note (1966 amendment).[14] The Advisory Committee's Note regarding Rule 33 likewise refers back to Rule 29(c), and cites the decision in *Smith*. See Fed. R. Crim. P. 33 advisory committee's note (1966 amendment). Finally, the Advisory Committee's Note to Rule 45 cites *Robinson*, and states that Rule 45(b) "makes it clear that the only circumstances under which extensions [of time] can be granted under Rule[] 29 * * * are those stated in" that Rule itself. Fed. R. Crim. P. 45 advisory committee's note (1966 amendment). The drafters of Rule 29(c) and Rule 45(b) thus expressed their intention that the seven-day time limit be binding and jurisdictional. See 4 Mark S. Rhodes, *Orfield's Criminal Procedure under the Federal Rules* § 29:2, at 503-508 (2d ed. 1987) (reviewing drafting history of Rule 29(c)).

[14] The Reporter's Comment on the January 1961 First Tentative Draft of Rule 29(c) likewise noted that, "[i]f any change is made in the 5-day period under Rule 33, this rule should be changed to conform." CIS Records of the Judicial Conference of the United States, Committee on Rules of Practice and Procedure, 1935-1988—Committee on Criminal Procedure, CM 3710-70 (microfiche).

B. There Is No Source Of Judicial Authority To Override The Time Limit Mandated By Rule 29(c)

Petitioner does not argue that the text or history of Rule 29 or Rule 45 support, or are even consistent with, his claim (Br. 8) that a district court has the "discretion" to enter a judgment of acquittal when no timely motion for such relief has been made within seven days of the discharge of the jury. Instead, he bases his claim for "flexible" application of Rule 29(c)'s time limits on other rules or statutes (Br. 10), and on the district court's "inherent supervisory power" (Br. 30). None of those sources gives a court power to disregard the time limits of Rule 29(c).

1. *Federal Rule of Criminal Procedure 2*: Petitioner relies first (Br. 10-11) on Federal Rule of Criminal Procedure 2, which provides that the Rules of Criminal Procedure are "intended to provide for the just determination of every criminal proceeding. They shall be construed to secure simplicity in procedure, fairness in administration and the elimination of unjustifiable expense and delay." Nothing in the very general language of Rule 2 suggests that that Rule was intended to override the time limit prescribed by Rule 29(c) and reinforced by Rule 45(b). Nor does the Court's reliance on Rule 2 in *Fallen* v. *United States*, 378 U.S. 139 (1964), suggest that that Rule is assigned the office of permitting discretionary deviation from time limits as a matter of course. In *Fallen*, the Court determined, in the highly unusual circumstances of that case, that a defendant's untimely notice of appeal did not deprive the court of appeals of jurisdiction over his case. The Court noted that, while "the timely filing of a notice

of appeal is a jurisdictional prerequisite to the hearing of the appeal," under Rule 2, the Rules must be "approached with sympathy for their purpose." *Id.* at 142. The Court explained that the extraordinary nature of the case, and in particular that Fallen was incarcerated, ill, deprived of visitors, and forced against his will to proceed pro se, and that (before expiration of the ten-day deadline) Fallen had submitted a notice of appeal to prison authorities for mailing, required that his notice of appeal be accepted. *Id.* at 142-143.[15] Four Justices concurred, taking the position that "a defendant incarcerated in a federal prison and acting without the aid of counsel" in fact has timely filed a notice of appeal when he delivers it to prison authorities within the ten-day period provided in Rule 37. *Id.* at 144 (Stewart, J., concurring). "In other words," the concurring Justices concluded, "in such a case the jailer is in effect the clerk of the District Court within the meaning of Rule 37." *Ibid.*[16]

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[15] *Fallen*'s holding prompted an amendment to then-Rule 37 that allowed a district court to extend the time to file a notice of appeal for up to 30 days upon a finding of "excusable neglect." The substance of that amendment is today embodied in Federal Rule of Appellate Procedure 4(b). No comparable provision has ever been added to Rule 29; rather, the drafters of the Rules placed in Federal Rule of Criminal Procedure 45 stringent limits against the extension of the time period prescribed by Rule 29(c) except as that Rule itself provides.

[16] In *Houston* v. *Lack*, 487 U.S. 266 (1988), the Court adopted the approach taken by the *Fallen* concurrence and held that a pro se prisoner complies with the notice-of-appeal deadline if, within the time period fixed by the Federal Rules, he "deliver[s] the notice to prison authorities for forwarding to the District Court." *Id.* at 270. The Court noted that *Fallen* had rested on the recognition that "[t]he situation of prisoners

The narrow holding in *Fallen* does not assist petitioner. Unlike the defendant in that case, petitioner was represented by counsel at all stages of the case, and made no effort before the expiration of the deadline in Rule 29(c) to file a motion for judgment of acquittal in the district court. *Fallen* establishes no general principle that, under Rule 2, deadlines fixed by the Rules of Criminal Procedure should be applied "flexibly" so as to excuse his delinquency (Br. 10). That reading of *Fallen* cannot be squared with the decision in *Berman* v. *United States*, 378 U.S. 530 (1964) (per curiam), which was decided the same day as *Fallen*. In *Berman*, the defendant's notice of appeal had been due on a Saturday, and his attorney timely prepared the notice and asked an associate to file it on the preceding Friday. The associate, however, "left the office with a fever and went home to bed, where he stayed until late Sunday. Because of the associate's illness, the notice was not filed on Saturday; instead, it was filed Monday morning." *Id.* at 531 (Black, J., dissenting). The court of appeals dismissed the appeal as untimely, and this Court summarily affirmed, citing *Robinson*. See *id.* at 530. In his dissenting opinion, Justice Black noted that the notice of appeal deadline was being enforced even

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seeking to appeal without the aid of counsel is unique" (*ibid.*), because such a pro se prisoner's "control over the processing of his notice necessarily ceases as soon as he hands it over to the only public officials to whom he has access." *Id.* at 271-272. The decision in *Houston* gave rise to Federal Rule of Appellate Procedure 4(c), which provides that in cases involving "an inmate confined in an institution," the "notice of appeal is timely filed if it is deposited in the institution's internal mail system on or before the last day for filing." See Fed. R. App. P. 4 advisory committee's note (1993 amendment).

though "the sole reason for cutting off the defendant's right of appeal * * * is the fact that, after the defendant has decided to appeal, the lawyer to whom he entrusts the duty of physically transporting his notice of appeal * * * fails to get it there because he is taken ill." *Id.* at 532; see also *Santana* v. *United States*, 385 U.S. 848 (1966) (Black, J., dissenting from denial of certiorari); *Temple* v. *United States*, 386 U.S. 961 (1967) (Black, J., dissenting from denial of certiorari). The disposition of *Berman* establishes that *Fallen* rests principally on the incarcerated defendant's involuntary pro se status. It has no application to a case such as this, where a represented defendant fails to meet a jurisdictional deadline as the result of his counsel's lapse.

2. *Federal Rule of Criminal Procedure 57*: Petitioner also relies (Br. 15, 17) on *Arizona* v. *Manypenny*, 672 F.2d 761, 765-766 (9th Cir.) (Kennedy, J.), cert. denied, 459 U.S. 850 (1982), which invoked both Federal Rule of Criminal Procedure 57 and the "inherent power" of a district court in support of its holding that, more than seven days after the discharge of the jury, a court may revisit its denial of a timely filed motion for judgment of acquittal.[17] To the extent that petitioner relies on Rule 57, that reliance is misplaced. Rule 57 provides that, "[i]n all cases not provided for by rule, the district judges and magistrate judges may regulate their practice in any manner not inconsistent with

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[17] *Manypenny* was decided before *Bank of Nova Scotia* v. *United States*, 487 U.S. 250 (1988), which, as we discuss at page 32, *infra*, holds that a district court may not exercise its supervisory power where doing so would conflict with a Federal Rule of Criminal Procedure.

these rules or those of the district in which they act." Rule 57 does not authorize a court to grant an untimely motion for judgment of acquittal because the time limit for such motions *is* "provided for by rule"—Rule 29(c)—and because granting an untimely motion would be "inconsistent" with that Rule.

As the Advisory Committee's Note to Rule 57 explains, while the Federal Rules of Criminal Procedure "are intended to constitute a comprehensive procedural code for criminal cases in the Federal courts," Rule 57 allows individual judges or districts to set their own practices on "matters of detail" not addressed by those Rules, such as "the mode of impaneling a jury, the manner and order of interposing challenges to jurors, the manner of selecting the foreman of a trial jury, the matter of sealed verdicts, the order of counsel's arguments to the jury, and other similar details." Fed. R. Crim. P. 57 advisory committee's note (1944 adoption).[18] The time limit prescribed by Rule 29(c) is part of that nationally applicable procedural code, and hence is not a "matter of detail" subject to the discretion of a district judge. See *Miner* v. *Atlass*, 363 U.S. 641, 650 (1960) (purpose of requiring particular statutory procedures to be used to adopt Federal Rules was to ensure that "basic procedural innovations shall be introduced only after mature consideration of informed opinion from all relevant quarters, with all the opportunities for comprehensive and integrated treatment which such

[18] The order of closing arguments is today prescribed by Federal Rule of Criminal Procedure 29.1, which became effective in 1975. Rule 29.1 "reflects the Advisory Committee's view that it is desirable to have a uniform federal practice" in this area. See Fed. R. Crim. P. 29.1 advisory committee's note (1974 addition).

consideration affords"). Indeed, if Rule 57 were thought to leave a district judge discretion to enlarge the time period within which a post-verdict motion for judgment of acquittal could be filed, it would also presumably allow a judge to contract that time period —an action plainly inconsistent with Rule 29(c).[19]

3. *The All Writs Act (28 U.S.C. 1651)*: Petitioner also claims (Br. 23-25, 30) that a district court has authority under the All Writs Act, 28 U.S.C. 1651, to treat an untimely motion for judgment of acquittal as a petition for a writ of coram nobis, and to issue such a writ acquitting the defendant.[20] The traditional

[19] Rule 57 also allows a district court, after engaging in appropriate notice and comment procedures, to "make and amend rules governing its practice not inconsistent with these rules." Similarly, under the Rules Enabling Act, 28 U.S.C. 2071(a), "all courts established by Act of Congress may from time to time prescribe rules for the conduct of their business," so long as those rules are "consistent with Acts of Congress and rules of practice and procedure prescribed under" 28 U.S.C. 2072, another section of the Rules Enabling Act. As we have noted, any local rule altering the time limits governing motions for judgments of acquittal would be inconsistent with Rule 29(c) and hence void. In any event, the district in which petitioner was convicted has not adopted a rule authorizing a court to grant a motion for judgment of acquittal filed more than seven days after discharge of the jury. See Local Rules of Practice and Procedure, United States District Court for the Western District of Michigan (Aug. 1991).

[20] The All Writs Act, 28 U.S.C. 1651, provides:

> (a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.
>
> (b) An alternative writ or rule nisi may be issued by a justice or judge of a court which has jurisdiction.

scope of the coram nobis remedy does not extend to that situation. In any event, the coram nobis remedy may not be employed in a manner that effectively overrides a Federal Rule.

The writ of coram nobis was available at common law solely to correct errors of fact "of the most fundamental character" that had not been brought to the attention of the trial court and that "rendered the proceeding itself irregular and invalid." *United States* v. *Addonizio*, 442 U.S. 178, 186 (1979); see *United States* v. *Morgan*, 346 U.S. 502, 507 & n.9, 512 (1954); *Mayer*, 235 U.S. at 68; Yale Kamisar, Wayne R. LaFave, & Jerold H. Israel, *Modern Criminal Procedure* 1624-1625 (1994). For example, the writ could issue to bring before the court such heretofore unknown errors as the fact that "the defendant, being under age, appeared by attorney, or the plaintiff or defendant * * * died before verdict." *Mayer*, 235 U.S. at 68; see also *Morgan*, 346 U.S. at 508. In *Morgan*, this Court held that, under the All Writs Act, federal courts retain power to issue writs of coram nobis. 346 U.S. at 508. But, the Court noted, the writ is an "extraordinary remedy, available only under circumstances compelling such action to achieve justice," *id.* at 511, and may issue only where "no other remedy [is] available" and where there are "sound reasons existing for failure to seek appropriate earlier relief," *id.* at 512; see also *id.* at 511 (noting view at common law that "failure to use a known remedy at the time of trial may be a bar to subsequent reliance on the defaulted right").

In light of those principles, the coram nobis remedy is unavailable to petitioner, for several reasons. First, petitioner does not claim that proof of an extra-record fact would demonstrate the invalidity of his

conviction. Rather, petitioner claims that the evidence at trial was insufficient, a claim that, unlike the paradigmatic coram nobis claim, does not concern "matters of fact which had not been put in issue or passed upon." *Mayer*, 235 U.S. at 68. Second, petitioner does not attack "the validity and regularity" of the judgment itself, *Morgan*, 346 U.S. at 507 (internal quotation marks omitted), but, instead, the evidentiary basis for that judgment. See *Moody* v. *United States*, 874 F.2d 1575, 1576-1577 (11th Cir. 1989) (claim that newly discovered evidence demonstrates defendant's innocence "is not cognizable in a coram nobis proceeding" because it does not involve "a matter of fact of the most fundamental character which has not been put in issue or passed upon and which renders the proceeding itself irregular and invalid"), cert. denied, 493 U.S. 1081 (1990). Third, other remedies are available to petitioner, including the right to challenge the sufficiency of the evidence on direct appeal and to petition for collateral relief under 28 U.S.C. 2255. See pages 37-39, *infra*.

Finally, a writ of coram nobis may not be utilized to override a procedure mandated by statute or Federal Rule, such as Rule 29(c)'s time limit. As this Court has explained:

> The All Writs Act is a residual source of authority to issue writs that are not otherwise covered by statute. Where a statute specifically addresses the particular issue at hand, it is that authority, and not the All Writs Act, that is controlling. Although that Act empowers federal courts to fashion extraordinary remedies when the need arises, it does not authorize them to issue ad hoc writs whenever compliance with

> statutory procedures appears inconvenient or less appropriate.

Pennsylvania Bureau of Correction v. *United States Marshals Service*, 474 U.S. 34, 43 (1985); see *Smith*, 331 U.S. at 475 n.4 (in light of enactment of Federal Rules of Criminal Procedure, "it is difficult to conceive of a situation in a federal criminal case today where th[e] remedy [of coram nobis] would be necessary or appropriate"); *id.* at 471 ("The power of the District Court to make such an order [granting a new trial] turns entirely on the Rules of Criminal Procedure.").

4. "*Inherent Supervisory Power*": Finally, petitioner argues (Br. 9, 30) that a district court has "inherent supervisory power" to relieve a defendant "from the strict operation of the time limits" prescribed by Rule 29(c).[21] That claim, however, is foreclosed by this Court's decision in *Bank of Nova Scotia* v. *United States*, 487 U.S. 250 (1988), which holds that a district court may not exercise its supervisory power where doing so would "circumvent" or "conflict with" a Federal Rule of Criminal Procedure. *Id.* at 254. At issue in *Bank of Nova Scotia* was whether a district court could use its supervisory powers to dismiss an indictment for misconduct before the grand jury that did not prejudice the defendant, notwithstanding the direction in

[21] While several courts have suggested that the "supervisory powers" of the federal courts are conferred by the All Writs Act, most have concluded that such powers derive from Article III of the Constitution. Sara Sun Beale, *Reconsidering Supervisory Power in Criminal Cases: Constitutional and Statutory Limits on the Authority of the Federal Courts*, 84 Colum. L. Rev. 1433, 1464 (1984).

Federal Rule of Criminal Procedure 52(a) that a district court must "disregard[]" any error that does not "affect substantial rights." The Court held it could not, because of the established principle that "[e]ven a sensible and efficient use of the supervisory power . . . is invalid if it conflicts with constitutional or statutory provisions." 487 U.S. at 254 (quoting *Thomas* v. *Arn*, 474 U.S. 140, 148 (1985)). That principle, the Court held, applies with equal force where the exercise of supervisory power would conflict with a Federal Rule of Criminal Procedure (*id.* at 255 (quoting *United States* v. *Payner*, 447 U.S. 727, 736 (1980))):

> Rule 52 is, in every pertinent respect, as binding as any statute duly enacted by Congress, and federal courts have no more discretion to disregard the Rule's mandate than they do to disregard constitutional or statutory provisions. The balance struck by the Rule between societal costs and the rights of the accused may not casually be overlooked "because a court has elected to analyze the question under the supervisory power."

See *id.* at 254 ("To allow otherwise 'would confer on the judiciary discretionary power to disregard the considered limitations of the law it is charged with enforcing.'") (quoting *Payner*, 447 U.S. at 737); *Chambers* v. *NASCO, Inc.*, 501 U.S. 32, 51 (1991) ("a district court [may] not rely on its supervisory power as a means of circumventing the clear mandate of a procedural rule"); *United States* v. *Hasting*, 461 U.S. 499, 505 (1983) (supervisory power cannot justify the reversal of a conviction based on nonprejudicial prosecutorial misconduct, because to do would

conflict with the requirement to overlook harmless error in Fed. R. Crim. P. 52); cf. *Palermo* v. *United States*, 360 U.S. 343, 353 n.11 (1959). A district court likewise may not use its supervisory power to override Rule 29(c)'s mandatory time limit for filing a post-verdict motion for judgment of acquittal.[22]

The exercise of supervisory authority to extend Rule 29(c)'s time limit would be particularly inappropriate in light of the scant precedent at common law for such action. Courts at common law did not enjoy the power to enter a judgment inconsistent with a jury's verdict in a criminal case. In England, after the jury found the defendant guilty, courts could recommend a royal pardon if they concluded that the evidence was insufficient, but could not themselves enter a post-verdict judgment of acquittal or dismissal. *Ex parte United States*, 101 F.2d 870, 875-876 & n.15 (7th Cir.), aff'd by an equally divided Court *sub nom. United States* v. *Stone*, 308 U.S. 519 (1939) (per curiam); 1 James Fitzjames Stephen, *A History of the Criminal Law of England* 311-313 (1883). Early decisions in the United States

[22] The decisions on which petitioner relies (Br. 9-14) recognize that supervisory power may be exercised only where no statute or Federal Rule has supplied a contrary rule of decision. In *United States* v. *Nobles*, 422 U.S. 225 (1975), the Court recognized a court's inherent authority to order the disclosure of a defense witness's written statements, but only after concluding that the exercise of that authority would not conflict with the Fifth Amendment, the Jencks Act (18 U.S.C. 3500), Federal Rule of Criminal Procedure 16, or the work-product doctrine. 422 U.S. at 233-240. See also *United States* v. *Hasting*, *supra* (discussed in text). Petitioner's reliance (Br. 14) on *Brock* v. *Pierce County*, 476 U.S. 253 (1986), is misplaced, because *Brock* involved the construction of a statutory time limit, not the exercise of supervisory power.

recognized a court's authority to direct a jury to acquit the defendant, see *Sparf* v. *United States*, 156 U.S. 51, 99-100, 105 (1895); *United States* v. *Fullerton*, 25 Fed. Cas. 1225, 1226 (C.C.S.D.N.Y. 1870) (No. 15,176), but few if any reported decisions from this period support entry of a judgment of acquittal following a guilty verdict. See Note, *Reservation of Motion for Directed Verdict in Federal Criminal Trials*, 49 Yale L. J. 733, 735, 736 & n.27 (1940); but see *State* v. *Meen*, 171 Wis. 36 (1920). Nor was the power to do so recognized by the leading treatises on criminal law and procedure of that era. See, *e.g.*, 1 Elijah N. Zoline, *Federal Criminal Law and Procedure* §§ 457-466, at 383-389 (1921); William L. Clark, Jr., *Handbook of Criminal Procedure* §§ 181-187, at 562-584 (2d ed. 1918); 2 Joel Prentiss Bishop, *New Criminal Procedure* §§ 1263-1288, at 1082-1126 (2d ed. 1913).

Not until 1939, seven years before the effective date of the Federal Rules of Criminal Procedure, did a federal court of appeals, in *Ex parte United States*, *supra*, hold that a district court could reserve ruling on a motion for directed verdict of acquittal, and later grant that motion after the jury convicted the defendant. In that case, the Seventh Circuit held that, while no statute authorized a district court to take such action, "the absence of express prohibitive legislation" left room for federal courts to enlarge "the procedures [governing directed verdicts] known at common law." 101 F.2d at 876. That decision was affirmed by an equally divided Supreme Court, and has been codified today in Rule 29(b). See Fed. R. Crim. P. 29 advisory committee's note (1944 adoption). We are aware, however, of no cases before the adoption of the Federal Rules of Criminal Procedure

granting a motion for acquittal first made after the verdict. Exercise of supervisory authority to grant such relief based on a motion more than seven days after discharge of the jury would therefore not only be at odds with Rule 29(c), but without precedent at common law.

C. Rule 29(c)'s Time Limit Advances Valid Systemic Interests While Preserving A Defendant's Right To Challenge The Sufficiency Of The Evidence On Appeal

Petitioner, finally, argues that enforcing Rule 29(c)'s seven-day deadline is ill-advised policy. He claims that a flexible treatment of that time limit (1) is needed "to ensure that an innocent man is not found guilty" and thereby to "preserve judicial integrity" (Br. 9); and (2) would not prejudice the government where the defendant has missed Rule 29(c)'s time limit by only one day (Br. 19).

1. As an initial matter, petitioner's policy arguments in favor of a flexible deadline are better addressed in a rule-making proceeding than in litigation over the meaning of the Rule as written. See note 15, *supra* (noting that amendment was made to Federal Rule of Criminal Procedure 37 to incorporate the concept of "excusable neglect"). Rule 29(c) reflects a balance of competing policy considerations, and it must be heeded unless its enforcement would be unconstitutional.[23] Cf. *Bank of*

[23] While petitioner does suggest (Br. 28-29) that enforcing Rule 29(c)'s time limits would violate his rights under the Due Process Clause of the Fifth Amendment, that claim lacks any merit. Far from denying petitioner due process of law, a rule that sets a clear and attainable time limit fully comports with the need for procedural regularity that is at the heart of the Due Process Clause. A legal system that lacked defined procedural deadlines would be chaotic and unmanageable. As for petitioner's claim (Br. 28-29) that the right to have a court grant a motion for judgment of acquittal made more than seven days after the discharge of the jury is "implicit in the concept of ordered liberty," *Palko* v. *Connecticut*, 302 U.S. 319, 325-326 (1937), that claim is defeated by the absence at common law of any tradition of granting post-verdict motions for judgment of acquittal. See pages 34-36, *supra*.

Nova Scotia, 487 U.S. at 255 (Rule 52 represents a "balance struck * * * between societal costs" and principles of finality on the one hand, "and the rights of the accused" on the other). As this Court explained in *Robinson* when faced with the analogous claim that enforcing the requirement that a notice of appeal be filed within ten days would be unjust:

> That powerful policy arguments may be made both for and against greater flexibility with respect to the time for the taking of an appeal is indeed evident. But that policy question, involving, as it does, many weighty and conflicting considerations, must be resolved through the rule-making process and not by judicial decision. * * * Whatever may be the proper resolution of the policy question involved, it was beyond the power of the Court of Appeals to resolve it.

361 U.S. at 229-230. The district court in this case likewise had no basis for substituting its appraisal of the merits of a binding seven-day time limit for the determination reflected in Rule 29(c).

2. In any event, petitioner's assertion that enforcing the time limit set by Rule 29(c) would prevent the reversal of the conviction of an "actually innocent" defendant (Br. 9-14) is unfounded. Rather than

foreclosing review, enforcing the time limit set by Rule 29(c) simply shifts the forum in which a claim of insufficient evidence is litigated after the verdict, from the district court to the court of appeals. A defendant who fails to make a post-verdict motion for judgment of acquittal retains the right to claim on appeal that the evidence was insufficient as a matter of law. And, although petitioner failed to do so here, defendants typically file motions for judgments of acquittal under Rule 29(a) before a case is submitted to the jury but after the evidence on either side is closed, and, where such motions are denied, thus preserve their right to appellate review of evidentiary sufficiency even in the absence of a Rule 29(c) post-verdict motion. See *United States* v. *Overmyer*, 867 F.2d 937, 938 (6th Cir.) (same standard governs appeal from denial of Rule 29(a) motion as appeal from denial of Rule 29(c) motion), cert. denied, 493 U.S. 813 (1989). In the rare case of a defendant such as petitioner who has made no such motion, a claim of insufficient evidence is still reviewable on appeal, under a plain error standard of review. See generally *United States* v. *Olano*, 113 S. Ct. 1770 (1993). Petitioner thus will have the opportunity to establish on appeal that it was plain error for the district court not to dismiss the case on its own motion on the ground that no "rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson* v. *Virginia*, 443 U.S. 307, 319 (1979).[34]

[34] The courts of appeals have consistently acknowledged the right of the defendant to plain error review of a claim of insufficient evidence where the defendant has failed to make a timely motion for judgment of acquittal in the district court. See *United States* v. *Santistevan*, 39 F.3d 250, 256-257 (10th Cir. 1994) (finding plain error); *United States* v. *Zolicoffer*, 869 F.2d 771, 774 (3d Cir.) (plain error), cert. denied, 490 U.S. 1113 (1989); see also *United States* v. *Muniz*, 60 F.3d 65, 67 (2d Cir. 1995) (no plain error); *United States* v. *Quintero-Barraza*, 57 F.3d 836, 843-844 (9th Cir. 1995) (no plain error); *United States* v. *Cox*, 957 F.2d 264, 265 (6th Cir. 1992) (no plain error); *Fagan*, 821 F.2d at 1009 & n.2 (no "manifest miscarriage of justice"); cf. *United States* v. *South*, 28 F.3d 619, 626 n.3 (7th Cir. 1994). There is, in fact, some uncertainty about whether the "plain error" standard for reviewing insufficiency claims first made on appeal differs from the standard for reviewing insufficiency claims properly preserved in the district court. See 2 Charles Alan Wright, *Federal Practice and Procedure (Criminal)* § 469, at 675 (2d ed. 1982); see also *United States* v. *Davis*, 583 F.2d 190, 199 (5th Cir. 1978) (Clark, J., concurring in part and dissenting in part). And contrary to petitioner's suggestion (Br. 12) that the *Jackson* v. *Virginia* standard governing claims of insufficient evidence applies only to claims raised in the court of appeals, that standard applies as well to post-verdict motions for judgment of acquittal made in the district court. See, *e.g.*, *Overmyer*, 867 F.2d at 938-939.

In addition, a defendant such as petitioner who claims (Br. 12) that the failure to make a timely motion under Rule 29(c) was the product of an unprofessional error by defense counsel may also be entitled to collateral relief under 28 U.S.C. 2255. If the defendant can establish that counsel's overall representation "fell below an objective standard of reasonableness," *Strickland* v. *Washington*, 466 U.S. 668, 688 (1984), and that there is a reasonable probability that, absent defense counsel's errors, the result in the case would have been different, *id.* at 694, the claim may be reviewed notwithstanding the defendant's procedural default. See *United States* v. *Frady*, 456 U.S. 152 (1982); cf. *Robinson*, 361 U.S. at 230 n.14; *Smith*, 331 U.S. at 475-476.

Also unavailing is petitioner's claim (Br. 12) that enforcing Rule 29(c)'s time limit would result in the

incarceration of a defendant whom the district court regards as not guilty pending resolution of his appeal. The provision that governs bail pending appeal, 18 U.S.C. 3143(b), authorizes a district court to release on bail a defendant who establishes that the appeal "raises a substantial question of law or fact likely to result in * * * (i) reversal, (ii) an order for a new trial, [or] (iii) a sentence that does not include a term of imprisonment." 18 U.S.C. 3143(b)(1)(B).[25] When a district judge believes that a post-verdict motion for judgment of acquittal would have had merit but for the untimeliness of that motion, it is likely that the judge will find the bail standard to have been met.

Petitioner suggests (Br. 19) that to honor a motion for judgment of acquittal filed only one day late would not offend the policies supporting Rule 29(c)'s time limit. But if jurisdictional time limits are to have any meaning, they must be strictly enforced.[26] Petitioner's "flexible" approach would defeat the systemic interest in the predictability of time limits, require

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[25] To release a convicted defendant on bail pending appeal, the district court must also find, by clear and convincing evidence, "that the [defendant] is not likely to flee or pose a danger to the safety of any other person or the community if released." 18 U.S.C. 3143(b)(1)(A).

[26] As this Court has noted in another context, "[i]f 1-day late filings are acceptable, 10-day late filings might be equally acceptable, and so on in a cascade of exceptions that would engulf the rule erected by the filing deadline; yet regardless of where the cutoff line is set, some individuals will always fall just on the other side of it. Filing deadlines, like statutes of limitations, necessarily operate harshly and arbitrarily with respect to individuals who fall just on the other side of them, but if the concept of a filing deadline is to have any content, the deadline must be enforced." *United States* v. *Locke*, 471 U.S. 84, 101 (1985).

district and appellate courts to undertake inquiries into whether particular delinquent filings were justified, and frequently delay appellate review. See *Robinson*, *supra* (affirming dismissal of appeal where notice of appeal filed 11 days late); *Berman*, *supra* (affirming dismissal of notice of appeal filed two days late); see also *Coleman* v. *Thompson*, 501 U.S. 722, 740 (1991) (denying collateral relief to defendant in capital case who filed notice of appeal three days beyond State's mandatory 30-day time limit); *Brown* v. *Allen*, 344 U.S. 443, 484-487 (1953) (denying collateral relief to defendant who filed notice of appeal one day beyond State's mandatory 60-day time limit); see also Fed. R. Crim. P. 2 (purpose of Federal Rules includes "the elimination of unjustifiable expense and delay"). Rule 29(c)'s time limit also has the effect of ensuring that motions for judgment of acquittal will be resolved before sentencing in all but the extraordinary case. That, in turn, reduces the possibility that the resolution of the Rule 29(c) motion might be colored by the district judge's heightened understanding by the time of sentencing of the defendant's background or likely sentencing range.[27]

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[27] Petitioner purports to cabin his proposed exception to Rule 29's time limit by proposing (Br. 22-23) that that limit be disregarded only when "(1) the motion is made prior to sentencing, (2) the motion was not timely filed because of an attorney's mistake and (3) there is a claim that the defendant is actually innocent." Petitioner's exception would swallow Rule 29(c), however, because his three conditions will almost always apply: a motion for judgment of acquittal is by definition a claim that the defendant is legally innocent; a motion will almost always be filed before sentencing; and a represented defendant who does not file a timely motion for acquittal can always claim that his attorney was responsible for that decision.

Rule 29(c) accounts for the occasional need of a defendant for additional time to prepare a motion for judgment of acquittal, or of a district court to consider the merits of granting such relief. See *Smith*, 331 U.S. at 475. It does so by allowing a defendant to seek extension of the seven-day time limit before that period has run, see Fed. R. Crim. P. 29(c), and by allowing a district court to reserve judgment on a pre-verdict motion until after the verdict, see Fed. R. Crim. P. 29(b). An open-ended invitation to further extensions, however, "is no insurance of justice." *Smith*, 331 U.S. at 476. As the Court has observed (*ibid.*):

> On the contrary, as time passes, the peculiar ability which the trial judge has to pass on the fairness of the trial is dissipated as the incidents and nuances of the trial leave his mind to give way to immediate business. It is in the interest of justice that a decision on the propriety of a trial be reached as soon after it has ended as is possible, and that decision not be deferred until the trial's story has taken on the uncertainty and dimness of things long past.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX

1. The All Writs Act, 28 U.S.C. 1651, provides:

§ 1651. Writs

(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

(b) An alternative writ or rule nisi may be issued by a justice or judge of a court which has jurisdiction.

2. Rule 2, Fed. R. Crim. P., provides:

Rule 2. Purpose and Construction

These rules are intended to provide for the just determination of every criminal proceeding. They shall be construed to secure simplicity in procedure, fairness in administration and the elimination of unjustifiable expense and delay.

3. Rule 33, Fed. R. Crim. P., provides:

Rule 33. New Trial

The court on motion of a defendant may grant a new trial to that defendant if required in the interest of justice. If trial was by the court without a jury the court on motion of a defendant for a new trial may vacate the

judgment if entered, take additional testimony and direct the entry of a new judgment. A motion for a new trial based on the ground of newly discovered evidence may be made only before or within two years after final judgment, but if an appeal is pending the court may grant the motion only on remand of the case. A motion for a new trial based on any other grounds shall be made within 7 days after verdict or finding of guilty or within such further time as the court may fix during the 7-day period.

4. Rule 45, Fed. R. Crim. P., provides:

Rule 45. Time

(a) Computation. In computing any period of time the day of the act or event from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, a Sunday, or a legal holiday, or, when the act to be done is the filing of some paper in court, a day on which weather or other conditions have made the office of the clerk of the district court inaccessible, in which event the period runs until the end of the next day which is not one of the aforementioned days. When a period of time prescribed or allowed is less than 11 days, intermediate Saturdays, Sundays and legal holidays shall be excluded in the computation. As used in these rules, "legal holiday" includes New Year's Day, Birthday of Martin

Luther King, Jr., Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans Day, Thanksgiving Day, Christmas Day, and any other day appointed as a holiday by the President or the Congress of the United States, or by the state in which the district court is held.

(b) Enlargement. When an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion (1) with or without motion or notice, order the period enlarged if request therefor is made before the expiration of the period originally prescribed or as extended by a previous order or (2) upon motion made after the expiration of the specified period permit the act to be done if the failure to act was the result of excusable neglect; but the court may not extend the time for taking any action under Rules 29, 33, 34 and 35, except to the extent and under the conditions stated in them.

[(c) Unaffected by Expiration of Term.] (Rescinded Feb. 28, 1966, eff. July 1, 1966.)

(d) For Motions; Affidavits. A written motion, other than one which may be heard *ex parte*, and notice of the hearing thereof shall be served not later than 5 days before the time specified for the hearing unless a different period is fixed by rule or order of the court. For cause shown such an order may be made

on *ex parte* application. When a motion is supported by affidavit, the affidavit shall be served with the motion; and opposing affidavits may be served not less than 1 day before the hearing unless the court permits them to be served at a later time.

(e) Additional Time After Service by Mail. Whenever a party has the right or is required to do an act within a prescribed period after the service of a notice or other paper is served by mail, 3 days shall be added to the prescribed period.

5. Rule 57, Fed. R. Crim. P., provides:

Rule 57. Rules by District Courts

Each district court by action of a majority of the judges thereof may from time to time, after giving appropriate public notice and an opportunity to comment, make and amend rules governing its practice not inconsistent with these rules. A local rule so adopted shall take effect upon the date specified by the district court and shall remain in effect unless amended by the district court or abrogated by the judicial council of the circuit in which the district is located. Copies of the rules and amendments so made by any district court shall upon their promulgation be furnished to the judicial council and the Administrative Office of the United States Courts and be made available to the public. In all cases not provided for by rule, the district judges and

magistrate judges may regulate their practice in any manner not inconsistent with these rules or those of the district in which they act.

(8)

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1995

CHARLES CARLISLE,

Petitioner,

vs.

UNITED STATES OF AMERICA.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Sixth Circuit

REPLY BRIEF OF PETITIONER

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QUESTION PRESENTED

Whether a motion for judgment of acquittal brought under Federal Rule of Criminal Procedure 29(C) that is granted by the United States District Court should be overturned because it was filed eight (8) days after the jury's verdict?

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REPLY BRIEF OF PETITIONER

STATEMENT OF THE CASE

The government has attempted to advance two arguments in its statement of the case. First, the government is trying to convince this Court that there was sufficient evidence to convict the Petitioner. Second, the government is trying to argue that the district court granted the motion for judgment of acquittal because of sympathy it had for the Petitioner as a veteran of the Vietnam War. Both of these arguments are wrong for two reasons. First, the government is factually incorrect. The evidence at trial was insufficient to convict the Petitioner. The district court granted the motion for judgment of acquittal because of the insufficiency of the evidence. Second, these arguments should have no bearing on the issue before this Court, which is whether or not the district court can grant a motion for a judgment of acquittal which is filed eight (8) days after a jury's verdict.

I. THE EVIDENCE AT TRIAL WAS INSUFFICIENT TO CONVICT PETITIONER.

The district court found that there was insufficient factual evidence to convict the Petitioner. The United States Court of Appeals for the Sixth Circuit did **not** reverse the district court's finding that the evidence was insufficient. The issue of the insufficiency of the evidence was raised in the briefs filed by both parties in the United States Court of Appeals for the Sixth Circuit. The United States Court of Appeals for the Sixth Circuit ignored the issue of the insufficiency of the evidence and only found that the motion for judgment of acquittal should not have been granted by the district court because it was filed eight (8) days after the jury's verdict. As this case is presented to this Court, Petitioner Charles Carlisle is

factually innocent. The district court has found that the Petitioner is factually innocent. No court has reversed that finding.

The district court found the following:

> 1. At trial the government did not produce any evidence that the Petitioner had entered into an agreement with any member of the conspiracy. (J.A. 43)
>
> 2. During the course of hours of tape recorded conversations no conspirators suggested that the Petitioner was involved in the conspiracy. (J.A. 43)
>
> 3. There was no evidence that the Petitioner was involved in arranging the transport of the marijuana to Michigan. (J.A. 43)
>
> 4. Prior to actually coming to Michigan the government's chief witness, Thomas Crawford, testified he had never heard of the Petitioner. (J.A. 44)
>
> 5. There was no evidence to indicate that the Petitioner was to benefit monetarily, or in any other way, from the alleged conspiracy. (J.A. 44)

The district court specifically held that "the government's case against Charles Carlisle is insufficient to prove beyond a reasonable doubt that Carlisle knowingly and voluntarily joined the conspiracy." (J.A. 44) There has been no finding by any court that the district court's decision on this matter was wrong.

II. THE DISTRICT COURT DID NOT GRANT THE PETITIONER'S MOTION FOR JUDGMENT OF ACQUITTAL BECAUSE THE PETITIONER HAD RECEIVED THE BRONZE STAR FOR HIS MILITARY SERVICE IN THE VIETNAM WAR.

Petitioner Charles Carlisle received the Bronze Star for his service during the Vietnam War. (J.A. 35) The government, in its brief, attempts to use this award against the Petitioner. The government implies in its brief that the district court had improper sympathy for the Petitioner because of his status as a veteran of the Vietnam War. This is incorrect. On August 19, 1993 the district court initially denied the motion for judgment of acquittal filed by the Petitioner. One day later, on August 20, 1993, the United States Court of Appeals for the Sixth Circuit decided the case of *United States v Jenkins*, 4 F.3d 1338 (6th Cir. 1993). The district court specifically relied upon this new case, decided after the Petitioner's motion for judgment of acquittal had been initially denied, in granting the motion for judgment of acquittal on October 14, 1993. The district court followed *Jenkins* for the proposition that the district court's inquiry should consist of two questions. First, the district court should analyze what the co-conspirator could reasonably foresee. Second, even if the co-conspirator could reasonably foresee the quantity of drugs, the district court should determine if the co-conspirator joined the conspiracy for the entire quantity of the drugs. (J.A. 28) Although it is certainly true that the Petitioner was honorably discharged from the United States Army after serving nearly 12 months in the Vietnam War and receiving the Bronze Star, the district court decided this case based upon the evidence and based upon the subsequent case of *Jenkins*.

The issue before this Court is not, as implied in the government's brief, whether or not there was sufficient evidence to convict the Petitioner or whether the district court had sympathy for the Petitioner because he was

awarded the Bronze Star for his service during the Vietnam War. The issue before this Court is whether or not the district court had the authority to consider and grant a motion for judgment of acquittal filed eight (8) days after the jury's verdict.

ARGUMENT

I. THE DISTRICT COURTS HAVE THE AUTHORITY TO ENTER AN ORDER OF ACQUITTAL SUA SPONTE UNDER FEDERAL RULE OF CRIMINAL PROCEDURE 29(a).

The district court initially denied the Petitioner's untimely motion for judgment of acquittal. That motion for judgment of acquittal was not renewed by the Petitioner. The district court subsequently, on its own, granted the motion for judgment of acquittal based upon new judicial authority, the case of *United States v Jenkins*. *Jenkins* was not cited in the Petitioner's motion. The district court's action, in granting the motion for judgment of acquittal prior to sentencing and without a renewed motion by the Petitioner, was similar to a sua sponte entry of a judgment of acquittal. This Court should determine whether a district court has the authority to enter a judgment of acquittal after the seven (7) day period for filing a motion has expired.

The government, in its brief, takes the position that the district court lacks the jurisdiction to grant a judgment of acquittal to an actually innocent criminal defendant based solely on the expiration of the defendant's deadline for filing a motion for judgment of acquittal. If there is new legal authority, which is discovered by the district court more than eight (8) days after the jury's verdict is entered, but before the district court sentences a defendant, the district court should be able to utilize that authority to determine whether or not the defendant is actually innocent. The government's argument, followed

to its logical conclusion, means that if a controlling case is decided eight (8) days after a jury's verdict which completely changes the state of the law and would require the district court to find the defendant innocent, the district court would have no authority, either on a motion or sua sponte, to utilize the new authority and to make an appropriate decision. The district court would have to go through the futile exercise of sentencing the defendant. The defendant would then have to file an appeal. This absurd result unnecessarily burdens the criminal justice system.

Federal Rule of Criminal Procedure 29(c) constrains the defendant. Rule 29(c) does not constrain the district court. Rule 29(c) states that the defendant's motion must be made or renewed within seven (7) days. It does not say anything about when the district court may grant a judgment of acquittal. Nothing in Rule 29(c) limits the district court's inherent authority to take action sua sponte. The district court has jurisdiction until after a defendant is sentenced. There is no reason why the district court should be limited to granting a judgment of acquittal sua sponte more than seven (7) days after the jury's verdict just because that is the amount of time a defendant has to file a motion. Rule 29(c) does not limit the district court's ability to act on a defendant's motion after seven (7) days. It is not logical to contend that Rule 29(c) prevents the district court, if it is acting sua sponte, from entering an order of acquittal more than seven (7) days after the jury's verdict.

Rule 29(a) provides that a court on "its own motion shall order the entry of judgment of acquittal of one or more offenses charged in the indictment or information after the evidence on either side is closed if the evidence is insufficient to sustain a conviction of such offense or offenses." The government attempts to claim that Rule 29(a) is strictly limited to the period prior to submitting the case to the jury. Nothing in Rule 29(a), except for the heading of the subsection, supports the government's

position. Under Rule 29(a) the district court has the power, even beyond seven (7) days after the jury's verdict, to sua sponte grant a judgment of acquittal to make certain that a factually innocent individual is not convicted.

The government attempts to argue that under *United States v Smith*, 331 U.S. 469 (1947), the district court cannot sua sponte act outside the time limits set forth in the Federal Rules of Criminal Procedure. *Smith* is easily distinguishable from this case. First, in *Smith* the motion for a new trial had been granted after sentencing and after appeal. In this case, the motion for judgment of acquittal was granted prior to sentencing. In *Smith*, the district court, by granting the defendant a new trial, attempted to reverse the affirmance of the conviction by the United States Court of Appeals. Second, in *Smith* there was no claim that the defendant was actually innocent of the crime charged. In this case the district court has found that the Petitioner is factually innocent.

The argument that under Rule 29(a) the district court retains authority to sua sponte grant an innocent defendant a judgment of acquittal, at least until sentencing, is consistent with the language of Rule 29(a), and the policies and rationale behind the rule. "(T)he Rules are not, and were not intended to be, a rigid code to have an inflexible meaning irrespective of the circumstances." *Fallen v United States*, 378 U.S. 139, 142 (1964). Even though the Petitioner's motion in this case was filed one (1) day late, the district court granted the motion largely based upon *Jenkins* which was decided one (1) day after the district court initially denied the motion for judgment of acquittal. The district court had the authority to do this, sua sponte, under Rule 29(a) even if a motion had not been filed by the Petitioner. Even if this Court accepts the position of the government that the time limits under Rule 29(c) are mandatory for motions filed by a defendant, the district court has the residual authority to grant a judgment of acquittal sua sponte prior to sentencing.

Therefore, this Court should hold, based upon the facts of this case, that even if the district court does not have the jurisdiction to entertain a motion for a judgment of acquittal filed eight (8) days after a jury's verdict, the district court does have the power under Federal Rule of Criminal Procedure 29(a) to grant a judgment of acquittal sua sponte prior to sentencing.

II. THE DISTRICT COURTS HAVE INHERENT SUPERVISORY POWER TO ACT OUTSIDE THE FEDERAL RULES OF CRIMINAL PROCEDURE TO MAKE SURE THAT INNOCENT DEFENDANTS RECEIVE FAIR TRIALS.

The government, in its Brief, has principally relied on *United States v Robinson*, 361 U.S. 220 (1960). In *Robinson*, this Court held that the timely filing of a notice of appeal is mandatory and jurisdictional. In this case, unlike *Robinson*, the district court had jurisdiction at the time it decided the motion for judgment of acquittal. The Petitioner had not yet been sentenced. There should be no question that the district court in this case had jurisdiction at the time it granted the motion for judgment of acquittal. Unlike *Robinson*, the issue now before this Court is whether or not the motion for judgment of acquittal, filed one day late, should have been considered by the district court.

In *Robinson*, the defendants had filed a notice of appeal twenty-one (21) days after the judgment. The government filed a motion to dismiss because the notice of appeal was not filed within ten (10) days after the entry of the judgment as required by Federal Rule of Criminal Procedure 37(a). This Court limited its inquiry to the following question:

> The single question presented is whether the filing of a notice of appeal in a criminal case after expiration of the time prescribed in Rule 37(a)(2) confers jurisdiction of the appeal upon

> the Court of Appeals if the District Court, proceeding under Rule 45(b), has found that the late filing of the notice of appeal was the result of excusable neglect. 361 U.S. at page at 284.

Federal Rule of Criminal Procedure 45 provides that the court cannot enlarge the period for taking an appeal. In *Robinson*, this Court looked at the legislative history of Rule 45(b) and found that nothing within the history of that rule would support the position that the court of appeals has jurisdiction of an appeal when there is a late filing of a notice of appeal as a result of excusable neglect. Rule 45(b) provides that when an act is required to be done within a specified period of time the district court has discretion to enlarge that period of time if the request is made before the expiration of the period originally prescribed or if the request is made upon motion after the expiration of the specified period if the failure to act was the result of excusable neglect. Under Rule 45(b) the district court may not extend the time for taking any action under Rule 29.

Robinson was decided in 1960. This Court has limited the applicability of *Robinson* in several cases decided since then. In *Harris Truck Lines, Inc. v Cherry Meat Packers, Inc.*, 371 U.S. 215 (1962), the petitioner's motion for a new trial had been denied on June 28, 1961. Local trial counsel was present at the motion for new trial. The petitioner's general counsel had been vacationing in Mexico at the time of the motion for new trial. The petitioner's general counsel returned to the country on July 20, 1961. On July 13, the petitioner's local counsel asked the district court for an extension of time to appeal beyond the thirty (30) day limit then set forth in Federal Rules of Civil Procedure 73(a). The district court granted an extension to August 11, 1961. The notice of appeal was filed on August 11, 1961. The court of appeals dismissed the appeal holding that there was not basis to waive the thirty (30) day limit because a showing of excusable neglect based upon the failure of a party to learn about

the entry of the judgment had not been made out. This Court, while recognizing that the standard was that the moving party had to show "excusable neglect based on the failure of a party to learn of the entry of the judgment", reinstated the appeal and held as follows:

> In view of the obvious great hardship to a party who relies upon the trial judge's finding of "excusable neglect" prior to the expiration of the 30-day period and then suffers reversal of the finding, it should be given great deference by the reviewing court. Whatever the proper result as an initial matter on the facts here, the record contains a showing of unique circumstances sufficient that the Court of Appeals ought not to have disturbed the motion judge's ruling. The judgment is vacated and the case is remanded to the Court of Appeals so that petitioner's appeal may be heard on its merits. 371 U.S. at page 285.

In *Harris Truck Lines*, the petitioner knew of the entry of the judgment. On June 28, 1961, the petitioner's local counsel was present when the motion for a new trial was denied. Despite the fact that the strict language of the rule was not complied with, this Court found that under a "showing of unique circumstances" the court of appeals should not have disturbed the district court's ruling.

In *Thompson v Immigration and Naturalization Service*, 375 U.S. 384 (1964), the final order in the district court had been entered on April 18, 1962. Twelve (12) days later the petitioner served notice that he would be filing post-trial motions including a motion for new trial. The motions were denied. The petitioner filed a notice of appeal within sixty (60) days of the denial of the post-trial motions but not within sixty (60) days of the original entry of the final judgment by the district court. The post-trial trial motions were not timely filed because they were not served within ten (10) days of the entry of the final judgment. Federal Rule of Civil Procedure 73(a) provides

that an appeal can only be taken within sixty (60) days from the entry of a final judgment or an order entered after a timely motion for new trial. This Court looked beyond the specific language of the rule and held that under the unique circumstances of the case the petitioner's appeal should be heard on the merits.

The facts of this case present unique circumstances similar to those in *Thompson* and *Harris Truck Lines*. The Petitioner's motion was filed one day late. The Petitioner's motion was filed when the district court retained jurisdiction. The Petitioner's motion was filed prior to sentencing. The district court heard and decided the motion prior to sentencing. The district court found that the Petitioner was legally innocent. New case law was available to the district court after the seven (7) days had expired. The motion was untimely because of a court appointed attorney's error. Under these unique circumstances, this Court should find that the district court did have the authority to hear and decide the Petitioner's motion for judgment of acquittal.

If this Court were to adopt the government's argument and apply the rationale of *Robinson* to the facts of this case, the Petitioner would only be left with a collateral attack on the jury's verdict. It is preferable that the district court directly decide the issue of the sufficiency of the evidence as opposed to having the matter decided on appeal or by collateral attack. In *Bartone v United States*, 375 U.S. 52 (1964), this Court stated:

> Where state procedural snarls or obstacles preclude an effective state remedy against unconstitutional convictions, federal courts have no other choice but to grant relief in the collateral proceeding. See *Fay v Noia*, 372 U.S. 391, 83 S.Ct. 822, 9 L.Ed.2d 837. But the situation is different in federal proceedings, over which both the Courts of Appeals and this Court (*McNabb v United States*, 318 U.S. 332, 63 S.Ct. 608, 87 L.Ed. 819) have broad powers of supervision. It is

> more appropriate, whenever possible, to correct errors reachable by the appeal rather than remit the parties to a new collateral proceeding. 375 U.S. at page 54.

The government is asking this Court to strictly apply *Robinson* to the facts of this case. The government argues that the Petitioner should be required to file a motion under 28 U.S.C. § 2255 or to file an appeal. Under either alternative, there is an increased burden on the criminal justice system. It would be preferable to have the issue of the sufficiency of the evidence decided by the district court, rather than have the further burden of an additional appeal, or an additional hearing on a motion filed pursuant to 28 U.S.C. § 2255. In *Oscar Meyer & Co. v Evans*, 441 U.S. 750, 765 (1979), this Court stated that "to require a second 'filing' by the aggrieved party after termination of state proceedings would serve no purpose other than the creation of an additional procedural technicality." In this case, the second filing, whether an appeal or a motion under 28 U.S.C. § 2255 serves no purpose. It would be an additional procedural technicality. An additional filing creates a greater burden on the system.

The government also relies upon the cases of *United States v Hastings*, 461 U.S. 499 (1983) and *Bank of Nova Scotia v United States*, 487 U.S. 250 (1988), for its argument that a district court may not exercise its supervisory power if the exercise of that power would conflict with the Federal Rules of Criminal Procedure. Neither of these cases deals with a circumstance where a rule of procedure directly impairs an important value like avoiding the wrongful conviction of an innocent man. Both of these cases involve harmless error principles under Federal Rule of Criminal Procedure 52. In *Hastings* and *Bank of Nova Scotia* the use of the supervisory power to correct a mistake did not have substantial prejudicial impact on the defendant. The supervisory power of the federal courts is most important where, as here, the supervisory

power is used to prevent a clear miscarriage of justice. There is much less reason to invoke the supervisory power of the federal courts where the power is used only to correct errors that do not have substantial effect on the outcome of the proceedings.

In *Hastings*, this Court held that one of the purposes underlying the supervisory power of the federal courts is "to preserve judicial integrity by ensuring that a conviction rests on appropriate considerations validly before the jury". 461 U.S. at page 505. In this case, the district court has found the evidence insufficient to convict the Petitioners, yet, as the Petitioner comes before this Court, he has been determined guilty. The supervisory power of the federal courts should be invoked under these facts to avoid this result.

The government in its brief does not address the case of *United States v Gaca*, 411 U.S. 618 (1973). In *Gaca*, unlike *Hastings* and *Bank of Nova Scotia*, a mistake was made which had a substantial prejudicial impact on the defendant. The defendant's appeal was dismissed because of his failure to pay a twenty-five ($25) dollar filing fee. The government agreed that it was appropriate "to reinstate the appeal in the exercise of this Court's supervisory power". *Id.*

In footnote 21 of its brief, the government suggests that the supervisory power of the federal courts derives from Article III of the Constitution. If the federal court's supervisory power derives from Article III of the Constitution then it cannot be limited by the Federal Rules of Criminal Procedure. Where the supervisory power is used to protect an innocent person from a wrongful conviction it cannot be limited by procedural rules. The supervisory power of the district courts, inherent in Article III of the Constitution, should relieve an actually innocent defendant from procedural rules that would otherwise restrict the district court's ability to hear and decide his or her claim.

This Court has held that once a reviewing court obtains jurisdiction of one issue in a case it may consider questions arising in other stages of the case. *Mercer v Theriot*, 377 U.S. 152 (1964); *Urie v Thompson*, 337 U.S. 163 (1950). In this case the district court retained jurisdiction over the defendant because he had not yet been sentenced. The district court should have had the authority to decide the motion for judgment of acquittal. This Court should hold that the mistake of an attorney in filing a motion for a judgment of acquittal one (1) day late, when the defendant is legally innocent, constitutes unique circumstances within the meaning of *Thompson* and *Harris Truck Lines*.

III. THE RATIONALE BEHIND THE TIME LIMIT ESTABLISHED IN FEDERAL RULE OF CRIMINAL PROCEDURE 29(C), TO PREVENT HAVING A TRIAL JUDGE DECIDE A MOTION FOR JUDGMENT OF ACQUITTAL AFTER A CONSIDERABLE PERIOD OF TIME HAS PASSED AND THE TRIAL JUDGE MAY NOT REMEMBER THE PARTICULAR FACTS OF THE TRIAL, DOES NOT APPLY TO THE FACTS OF THIS CASE WHERE THE MOTION FOR JUDGMENT OF ACQUITTAL WAS FILED EIGHT (8) DAYS AFTER THE TRIAL.

In its brief the government argues for a strict interpretation of the Federal Rules of Criminal Procedure. In support of its position that an actually innocent defendant, whose court-appointed attorney files a motion for judgment of acquittal one day late, should be denied an opportunity to have the trial judge decide the motion, the government relies on the following quote from *United States v Smith*, 331 U.S. 469, 476 (1947):

> On the contrary, as time passes, the peculiar ability which the trial judge has to pass on the fairness of the trial is dissipated as the incidents and nuances of the trial leave his mind to give

> way to immediate business. It is in the interest of justice that a decision on the propriety of a trial be reached as soon after it has ended as is possible, and that decision not be deferred until the trial's story has taken on the uncertainty and dimness of things long past.

The trial's story had not taken on the "uncertainty and dimness of things long past" in this case. The motion for judgment of acquittal was filed eight (8) days after the jury's verdict. In *Smith*, the motion for new trial was granted after appeal. In this case, the motion for a judgment of acquittal was granted prior to sentencing. In *Harris v Nelson*, 394 U.S. 286, 300 (1969), this Court stated:

> We do not assume that courts in the exercise of their discretion will pursue or authorize pursuit of all allegations presented to them. We are aware that confinement sometimes induces fantasy which has its basis in the paranoia of prison rather than in fact. But where specific allegations before the court show reason to believe that the petitioner may, if the facts are fully developed, be able to demonstrate that he is confined illegally and is therefore entitled to relief, it is the duty of the court to provide the necessary facilities and procedures for an adequate inquiry. Obviously, in exercising this power, the court may utilize familiar procedures, as appropriate, whether these are found in the civil or criminal rules or elsewhere in the "usages and principles of law."

This is a case where the Petitioner's confinement was illegal because he was found innocent by the district court. The supervisory power of the district courts should be utilized to allow the motion, filed eight (8) days after the jury's verdict, to be heard by the district judge. This is consistent with the rationale behind *Smith*.

This Court applied the Federal Rules of Appellate Procedure flexibly in the case of *Houston v Lack*, 487 U.S.

266 (1988). A state prisoner had filed a petition for habeas corpus relief. Twenty-seven (27) days after the judgment was entered in district court dismissing the habeas corpus petition, the petitioner deposited a notice of appeal with prison authorities before mailing it to the district court. The district court stamped the notice indicating it was filed thirty-one (31) days after the judgment was entered. This was one (1) day after the expiration of the thirty (30) day filing period for taking appeals under Federal Rule of Appellate Procedure 4(a)(1). This Court held that the notice of appeal was filed at the moment of delivery to prison authorities even though the clear language of Federal Rule of Appellate Procedure 4(a)(1) provides that the notice of appeal "shall be filed with the district court within thirty days". Although the language of Federal Rules of Appellate Procedure 4(a)(1) is clear, this Court looked beyond the strict requirements of the Rule to the rationale behind the Rule. This Court found that the rationale behind the Rule would not be carried out by applying the Rule to the facts of that particular case. That same reasoning should be applied to this case. The rationale behind the time limit established in Federal Rule of Criminal Procedure 29(c), as set forth in *Smith*, is to prevent a trial judge from deciding a motion for judgment of acquittal after a considerable period of time has passed and the trial judge may not remember the particular facts of the trial. The rationale behind the rule does not apply to the facts of this case where the motion for judgment of acquittal was filed eight (8) days after the jury trial.

The government contends that a strict interpretation of Federal Rule of Criminal Procedure 29(c) will not work an injustice because the Petitioner can appeal, under a plain error standard, or the Petitioner can file a motion under 28 U.S.C. § 2255. It will be difficult for the Petitioner to obtain relief under either one of those avenues. If the Petitioner appeals, a plain error standard would be applied. In *United States v Frady*, 456 U.S. 152, 166 (1982),

this Court reaffirmed "the well-settled principle that to obtain collateral relief a prisoner must clear a significantly higher hurdle than would exist on direct appeal." There is a significant risk that no relief can be obtained by the Petitioner once this case leaves the hands of the district court judge.

Even if the government was correct in its assertion that there are other avenues of review available, requiring the Petitioner to appeal or file a motion under 28 U.S.C. § 2255 is incredibly wasteful and inefficient. The district judge is in the best institutional position to evaluate the sufficiency of the evidence claim. The United States Court of Appeals should not be deprived of the district court's decision and review of the evidence.

IV. THE DISTRICT COURTS HAVE THE POWER TO GRANT AN UNTIMELY MOTION FOR JUDGMENT OF ACQUITTAL UNDER 28 U.S.C. § 1651.

The government contends in its brief that the All Writs Act does not apply to the facts of this case. The All Writs Act "has served since its inclusion, in substance, in the original Judiciary Act as a 'legislatively approved source of procedural instruments designed to achieve the rational ends of the law' ". *Harris v Nelson*, 394 U.S. 286, 299, (1969), quoting *Price v Johnston*, 334 U.S. 266, 282 (1948). "A federal court may avail itself of all auxiliary writs as aids in the performance of its duties, when the use of such historic aids is calculated in its sound judgment to achieve the ends of justice entrusted to it." *Adams v United States ex rel. McCann*, 317 U.S. 269, 273 (1942).

The All Writs Act should be flexibly applied. In *United States v New York Telephone Company*, 434 U.S. 159, 172 (1977), this Court stated:

> The Court has consistently applied the Act flexibly in conformity with these principles. Although § 262 of the Judicial Code, the predecessor to § 1651, did not expressly authorize

> courts, as does § 1651, to issue writs "appropriate" to the proper exercise of their jurisdiction but only "necessary" writs, *Adams* held that these supplemental powers are not limited to those situations where it is "necessary" to issue the writ or order "in the sense that the court could not otherwise physically discharge its appellate duties." 317 U.S., at 273, 63 S.Ct., at 239. In *Price v Johnston, supra*, § 262 supplied the authority for a United States Court of Appeals to issue an order commanding that a prisoner be brought before the court for the purpose of arguing his own appeal. Similarly, in order to avoid frustrating the "very purpose" of 28 U.S.C. § 2255, § 1651 furnished the District Court with authority to order that a federal prisoner be produced in court for purposes of a hearing. *United States v Hayman*, 342 U.S. 205, 220-222 (1952). The question in *Harris v Nelson, supra*, was whether, despite the absence of specific statutory authority, the District Court could issue a discovery order in connection with a habeas corpus proceeding pending before it. Eight Justices agreed that the district courts have power to require discovery when essential to render a habeas corpus proceeding effective.

This Court should hold that under the All Writs Act the district court had the authority to go outside the seven (7) day requirement of Federal Rule of Criminal Procedure 29(c). The rational ends of the law will be achieved if the Petitioner's motion for judgment of acquittal can be considered by the district court under the authority of the All Writs Act. The use of the All Writs Act to allow the district court to decide a motion for judgment of acquittal filed eight (8) days after a jury's verdict and before sentencing will achieve the ends of justice. One of the goals of the Federal Rules of Criminal

Procedure is to have a rational and efficient justice system. It would not be rational or efficient to hold that a district court, prior to sentencing, cannot decide a motion for judgment of acquittal on the basis that a defendant is actually innocent. There was no prejudice to the United States of America in this case. To require a defendant to appeal his conviction, even though the district court has found that he is actually innocent, is not efficient or rational. The defendant, because of his or her court-appointed attorney's error, would be denied a hearing on the motion in front of the district judge who heard all of the evidence. Even if the court of appeals does find in the defendant's favor, the system will have been unduly burdened by an additional appeal that should not have been required, In addition, the defendant faces the burden of convincing three judges on the court of appeals that the jury's decision was against the great weight of the evidence, without the benefit of having the decision of the district court who heard all of the testimony in the case.

In *Adams v United States*, 317 U.S. 269 (1942), this Court recognized that the federal courts have the power to issue a writ under the All Writs Act "where it may be necessary for the exercise of a jurisdiction already existing." 317 U.S. at page 273. In this case, the district court had jurisdiction because it granted the motion for judgment of acquittal prior to sentencing. After sentencing, the district court would no longer have jurisdiction and, therefore, it could not have exercised its power to grant a motion for judgment of acquittal under the All Writs Act.

This Court should rule that district courts, prior to sentencing, have the power to consider a motion for a judgment of acquittal where there is a claim that the defendant was actually innocent and the motion was not timely filed because of an attorney's error. In *Adams*, this Court stated that "procedural instruments are means for achieving the rational ends of law." 317 U.S. at page 273. Rule 29(c) must be viewed in this light. Where, as in this case, a strict reading of the rule may result in an irrational

result, the All Writs Act should be invoked by the district court "in its sound judgment to achieve the ends of justice entrusted to it." 317 U.S. at page 273. The most rational result in this case, which achieves the ends of justice, is to allow the district court to decide the motion for judgment of acquittal filed prior to sentencing, rather than having the matter appealed or be the subject of a motion under 28 U.S.C. § 2255.

An analogy can be made to the importance that this Court has placed upon providing access to the courts in the context of habeas corpus petitions. In *Harris v Nelson*, 394 U.S. 286, 291 (1969), this Court stated "the very nature of the Writ [of habeas corpus] demands that it be administered with the initiative and flexibility essential to insure that miscarriages of justice . . . are surfaced and corrected." In *Hensley v Municipal Court*, 411 U.S. 345, 350 (1973), this Court stated "we have consistently rejected interpretations of the habeas corpus statute that would suffocate the Writ in stifling formalism or effectiveness with the manacles of arcane and scholastic procedural requirements".

Petitioner Charles Carlisle should be allowed to have the district court decide his motion for a judgment of acquittal. The only reason the district court has been prevented from deciding his motion for judgment of acquittal is because his court-appointed attorney made a mistake and filed the motion for judgment of acquittal one day late. This Court should fashion a remedy so that Petitioner Charles Carlisle is not punished for his attorney's error. It is fair, rational and just that the district court should be allowed to hear and decide the motion for judgment of acquittal.

CONCLUSION

The judgment of the United States Court of Appeals for the Sixth Circuit should be reversed and the judgment of the United States District Court for the Western District of Michigan dated October 28, 1993 should be reinstated.

Respectfully submitted,

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